THE

LAW AND PRACTICE

OF

Diſtreſſes and Replevin,

BY THE LATE

Lord Chief Baron *GILBERT.*

TO WHICH IS ADDED

AN APPENDIX OF PRECEDENTS.

The THIRD EDITION, with CONSIDERABLE ADDITIONS, Taken from former and later Reports, and other Books of Authority;

And full PRACTICAL DIRECTIONS, from the Seizure of the Diſtreſs to the Sale and ſuing a Replevin.

BY WILLIAM HUNT,
OF LINCOLN'S INN.

Ego nimirum ſi excuſationis cauſas colligerem, ne cum illo conferrer, hoc ipſo crimen arrogantiæ ſubirem, quod me judicio cujuſquam exiſtimarem poſſe cum illo comparari.

CÆSAR.

LONDON:
PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;
FOR E. AND R. BROOKE, BELL-YARD, TEMPLE-BAR.
MDCCXCIV.

MVSEVM
BRITAN
NICVM

THIS EDITION

IS INSCRIBED

TO

JOHN BAYLEY, Esq.

BARRISTER AT LAW,

AS A TESTIMONY

OF

ESTEEM, FRIENDSHIP AND GRATITUDE,

BY HIS FRIEND, AND PUPIL,

THE EDITOR.

PREFACE

TO THE

PRESENT EDITION.

THIS Publication needs no apology, except for ſuch additions as are now, for the firſt time, introduced by the preſent Editor. Should they have the merit of rendering the work, upon the whole, more generally uſeful to the Profeſſion, perhaps it may in ſome meaſure incline them to pardon any inaccuracies diſcoverable in the performance. The Editor has incorporated the New Caſes, where the inſertion of them appeared to him to be the moſt proper; without altering any part of the original work, or of the additions that were made in the ſecond edition; except, perhaps, here and there a word or two introduced, for the purpoſe of rendering the connexion more natural and eaſy. That the Author may in no reſpect be anſwerable for the faults of his Editor, care has been taken to diſtinguiſh all the new matter, either by giving it in the form of notes, (*of which the laſt edition had none*) where it could not conveniently be interwoven with the text; or by "*inverted commas*" at the beginning and end of each paragraph; leaving the brackets which

which diſtinguiſhed the illuſtrations of the laſt edition, as before. There is a new diviſion made in each chapter, becauſe the Editor could not readily arrange the Caſes he wiſhed to introduce, under any diviſion adopted in the preceding editions. He has not gone to any great length, in the Pleadings in Replevin, (at leaſt not farther than the late deciſions neceſſarily led him) becauſe it was beyond the ſcope of his intention, which was, merely to collect and arrange the determinations that have taken place ſince the publication of the laſt edition, and to add ſome others, which he thought might be properly inſerted. The few practical directions which were given in that edition are for the moſt part preſerved, and, being corrected according to the lateſt deciſions, are incorporated with ſuch obſervations as the preſent Editor thought it neceſſary to add for the better underſtanding of the ſubject. Theſe are ſelected from books of the beſt authority; none of which, however, *ſingly* contain a regular account of all the proceedings from the ſeizure of the Diſtreſs to the ſuing a Replevin. The Editor has not preſerved the numerical order of the pages of either of the two former editions, which differ from each other, becauſe he finds that both thoſe editions are equally referred to, and indiſcriminately quoted.

Auguſt 12*th*, 1793.

No. 6, LINCOLN'S INN,
OLD SQUARE.

PREFACE

TO THE

FIRST EDITION.

AS *ſolidity of judgment, utility of matter, and perſpicuity of method, will be too obvious to every intelligent reader, on the firſt peruſal of the following Treatiſe, not to convince him that it is one of the elaborate pieces of the late Lord Chief Baron* GILBERT, *we preſume there needs no further apology for making it publick, eſpecially ſince it is a ſubject eſſentially neceſſary to be known by every individual who has any kind of inheritance or poſſeſſion; for it is calculated in ſuch a manner as to be of uſe to the public in general, but more particularly to ſheriffs, under-ſheriffs, ſtewards, landlords, tenants, &c. who ought to be thoroughly acquainted with this branch of the law.*

The

The tranſlations at the bottom of the pages are intended that this Book may be uſeful not only to Gentlemen of the Law, but to ſuch alſo as are unacquainted with the Original.

An Appendix of ſome well choſen Precedents is added for the eaſe of the Practiſer, and the whole rendered the beſt and compleateſt Book of its kind.

ADVER-

ADVERTISEMENT

TO THE

SECOND EDITION.

SOME time ſince, the Publiſher of the preſent Edition of this Work, prevailed on a gentleman, well known at the Bar, to reviſe it, and make ſuch additions, as to him ſhould ſeem neceſſary. This, he flatters himſelf, has been done, in a manner not undeſerving of the attention of the Profeſſion. The Work has received a very minute correction, as well in language, as in punctuation. The references have been all carefully examined; thoſe that were inappoſite have been retracted, thoſe that were inaccurate have been rectified, and ſuch as were neceſſary have been ſupplied. The diviſions have in ſome meaſure been altered; at the ſame time that others have been

added. Such of the modern Acts of Parliament, as well as of the judicial deciſions, which in any wiſe relate to the ſubject, have been introduced; and to the whole is ſubjoined a few Practical Directions; as alſo a new and complete Index. That the Reader may entertain a competent idea of the neceſſary alteration which this Treatiſe has undergone, it may not be improper to remind him, that ALL *the* ADDITIONS *are included within brackets: it was candid ſo to denote them, leſt the faults of the Editor ſhould be attributed to the Author. The "tranſlations at the "bottom of the pages" which diſgraced the former edition, the Editor of this has thought proper to omit.*

March 1ſt. 1780.

THE

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ERRATA AND CORRIGENDA.

For *far* lege *fair*, line 17. page 23.
For *he* lege *ſhe*, line 20, page 30.
For *might* lege *may*, line 26, page 31.
Inſert in Margin *Pool* v. *Duncombe*, Tr. 1657, oppoſite to line 20, page 33.
For *renant* lege *tenant*, line 5, page 51.
For *Halſe* in margin, line 6, lege *Hulſe*, page 51.
For *of* lege *of*, line 30, page 52.
Inſert in marg 2 *Inſt.* 507. line 16, page 57.
For *executiont* lege *execution*, and dele the bracket line 32, page 67.
For *at* lege *as*, line 14, page 70.
Inſert in margin v. *Mattaire*, line 4, page 160.
For *faciat* lege *facit*, line 2, page 231.

THE

THE LAW OF DISTRESSES AND REPLEVINS.

CHAP. I.

Of Distresses.

THE diſtreſs is a remedy given to the lord, to recover the rent or ſervices, which the tenant hath obliged himſelf by his feudal contract to pay, by way of retribution for his farm.

Theſe ſervices, when the feudal tenures prevailed, were chiefly of two ſorts; either MILITARY, as attending on the lord in war; or MINISTERIAL, as attending his courts in time of peace, and there aſſiſting him in the diſtribution of juſtice; or, ploughing and tilling his demeſne. Spel. Rem. 40. Bacon on Government. 47. Runnington's edit. of Hale.

The non-performance of theſe ſervices was, by the old feudal law, a forfeiture of the feud. This is evident from ſeveral paſſages in *Vigellius*, (under the title of *cauſæ ex quibus feudum amittitur*)—*Si vaſſalus domino non ſerviat, fidelitatemque ei non præſtet—Si vaſſalus, a domino ejus vocatus, non venerit—Si pactum feudi non ſervietur.*—Theſe, ſays he, were all forfeitures, and the lord on ſuch failures of his tenant, was at liberty by that law to re-aſſume his feud.

Vigel. 257. 271. 326. Jur. feud. ann. 126. 129. Run. edit. of Hale.

The rigour of this law was mitigated with us, and theſe feudal forfeitures changed into diſtreſſes, according to the pignorary method of the civil law; from whence the notion ſeems to have been firſt borrowed; as may be ſeen in the title, *de diſtrictione pignorum.—Creditoris arbitrio permittitur, ex pignoribus ſibi obligatis quibus velit diſtrictis, ad ſuum commodum pervenire.* For there appear no footſteps of it in the feudal authors.

Bacon on Government, 48.

Dig. lib. 20. tit. 5. fol. 660.

From whenceſoever the name or (*a*) the notion came, the remedy obtained ſo early in our law, that we have no memorial of its original with us; and as this power was anciently uſed by the lords, it grew as burthenſome and grievous to tenants, as the feudal forfeiture;—there being no difference to the tenant, between the lord's ſeizing the land itſelf and turning him out of poſſeſſion, and his ſtripping him of the whole produce of it at his pleaſure.

(*a*) The word "Diſtreſſe" is a French word; in Latin it is called Diſtrictio, five Anguſtia, becauſe the things diſtrained are put into a ſtrait, which we call a pound. Co. Lit. 96. a.

And

And not only the produce of the farm, but the *inducta & illata*, and every thing that was brought on the land, were liable to the lord's diſtreſs. By this means all the plunder of the war, which the vaſſal had brought home, was often carried off by the lord, and the diſtreſs, by his power, removed out of the reach of the tenant; and that on the ſlighteſt occaſions.

This power, thus practiſed by the lords, did not only oppreſs the tenants, but put them ſo entirely under the power of their lords, as to enable them to bring great numbers of vaſſals into the field againſt their prince, and thereby diſturb the publick peace of the kingdom.

Barr. on ſtat. 12, 13. 31. Madox Ex. c. 13. ſtat. Marl. Sulliv. lect. 101, 102.

There were yet two other inconveniences which aroſe from the abuſe of theſe diſtreſſes.

The firſt was, that in the diſputes which frequently aroſe between neighbouring lords themſelves, whilſt each lord was endeavouring to enlarge his bounds and encroach on his neighbour's property, the tenants were generally diſtrained by both; by which the tenant was brought within the ſeignory, and ſo became ſubject to that feudal dependence and ſervice which accompanied the military tenure.

The other miſchief was, that when the lords had brought them under their dependence, they would diſtrain them for the amerciaments of their courts; and, as the ſtatute of *Marlbridge* expreſſes it,—*graves ultiones fecerunt*,

52 Hen. 3. c. 1.

fecerunt, & diſtrictiones quouſque redemptiones receperint ad voluntatem ſuam. And what made the abuſes the more inſupportable, was, that the lords— *per miniſtros domini regis juſticiari non permittunt, nec ſuſtineant quod per ipſos liberentur diſtrictiones, quas auctoritate propriâ fecerint ad voluntatem ſuam.*—So that they ſeemed to throw off the authority of the law, and to ſubvert the fundamental rule, that no property was to be altered without the king's writ.

2 Inſt. 102, 3.

But theſe oppreſſions ended with the diſtractions of the barons' wars. For towards the end of the reign of *Hen.* 3. there were particular laws made to regulate the manner of diſtraining; not permitting the lords to extend this remedy, beyond the miſchief it was firſt introduced for; which was no more than to empower the lord by ſeizing the chattels, TO OBLIGE the tenant to perform the feudal ſervices.

Theſe were to remain in the lord's hands AS PLEDGES to compel the performance; and the detention was no longer lawful, than while the tenant refuſed to do the ſervices, which were reſerved by the feudal contract. By what ſteps it came to be brought under the regulations which govern it at this day, we ſhall have occaſion to obſerve, by conſidering,

Brac. l. 3. p. 130. Spelm. voc. eſcheata. Glan. l. 7. c. 17. Heng. parva, c. 6. Co. Lit. l. 1. c. 1. Dalrym. on feud. prop. 62. ed. 1757. Sulliv. lect. 65. 97. 100. ed. 1776.

I. The ſeveral ſorts of diſtreſſes, and in what caſes a diſtreſs lies.

II. "Who in reſpect of his eſtate or intereſt may diſtrain."

III. What things are diſtrainable.

IV. The

IV. [The time, place, and manner of making the diſtreſs.]

V. How the diſtreſs is to be uſed [and diſpoſed of;] and herein, of the POUND; [and of ſelling the diſtreſs.]

I. Of the ſeveral ſorts of diſtreſſes, and in what caſes a diſtreſs lies.

The diſtreſs at common law was uſed in ſix caſes, *viz.*

1. For the ſervice due to the lord ariſing from the tenure; as homage, fealty, rent, ſuit of court, *&c.* For the diſtreſs, as is already obſerved, came in, in lieu of the forfeiture, and was a mild alteration of the feudal law, which allowed the lord to ſeize the feud for the non-performance of the ſervices. 1 Ro. Abr. 665.

[*Rents* at common law, are of three kinds; rent-*ſervice*, rent-*charge*, and rent-*ſeck*.

Rent-ſervice, is where the tenant holdeth land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by other ſervice, and certain rent. It is called rent SERVICE, becauſe it hath always ſome CORPORAL SERVICE incident to it; which at the leaſt is fealty. And in caſe it be not paid at the day appointed, the lord may diſtrain for it of common right (*a*), without reſerving any ſpecial power of diſtreſs. Co. Lit 96. a. 142.

Rent-

(*a*) Of common right, that is by the common law, ſo called, my Lord Coke ſays, becauſe the common law is the beſt and moſt common birthright that the ſub-

Co. Lit. 143. *Rent-charge* is rent, for which the owner may diſtrain, not of common right, but by virtue of a clauſe in the deed which creates it.

Co. Lit. 143. *Rent-ſeck, redditus ſiccus*, or dry rent, is in effect nothing more than a rent granted by deed, but without any clauſe of diſtreſs. And for this ſpecies of rent there was no remedy by diſtreſs at the common law; but the grantee could only have charged the perſon of the grantor, in a writ of annuity.

2 Inſt. 19. There are alſo other ſpecies of rents, which are reducible to theſe three; ſuch as, rents of aſſiſe, chief rents, *&c.*

Rents of aſſiſe, are the certain eſtabliſhed rents of freeholders, and ancient copyholders; and are ſo called, becauſe they are *aſſiſed* and certain; and of theſe, the former are frequently called chief rents, "and both ſorts
2 Bl. Com. 43. are indifferently denominated *quit* rents, *quieti reditus*; becauſe thereby the tenant goes quit and free of all other ſervices."

Having given this general diviſion of rents, it remains to be obſerved that the difference between them, in reſpect to the mode of recovering them by diſtreſs, is now totally aboliſhed by the 4 *G.* 2. *c.* 28. § 5. which declares, that all perſons may have the like

ject has for the ſafeguard and defence, not only of his goods, lands, and revenues, but of his wife and children, his body, fame, and life alſo.

And it is to be obſerved, that the common law of England is ſometimes called right, ſometimes common right, and ſometimes communis juſtitia. Co. Litt. 142 a.

remedy

remedy by diſtreſs for rents ſeck, rents of aſſiſe, and chief rents, as in caſe of rents reſerved upon leaſe.—So that now it may be laid down as an univerſal principle, that a diſtreſs may be taken for any kind of rent in arrear.

" The 4 *G.* 2. *c.* 28. *ſ.* 5. relates to ſuch rents only as had been duly anſwered or paid for the ſpace of three years within the ſpace of twenty years before the firſt day of that ſeſſion of Parliament (21ſt *January* 1731) and ſuch as ſhould be thereafter created, and therefore where cognizance was made for a diſtreſs under the grant of a rent-ſeck in 1693, and the cognizance did not ſtate that the rent had been duly anſwered or paid for the ſpace of three years within the ſpace of twenty years before the firſt day of the ſeſſion of 4 *G.* 2. the court upon demurrer to the plea in bar held the cognizance bad."

Bradbury v. Wright, Doug. 624.

And by the 11 *G.* 2. *c.* 19. § 18. if any tenant ſhall give notice of his intention to quit the premiſſes at a time mentioned in ſuch notice, and ſhall not accordingly deliver up the poſſeſſion thereof at the time; he ſhall from thenceforth pay double rent, to be " *levied*, ſued for, and " recovered in like manner as the ſingle rent.]

" In an action upon this clauſe it has been determined that a tenant holding from year to year under a parol leaſe is within the words and meaning of it, and this though his notice is to quit at the end of the firſt year."

Timmins v. Rowlinſon 3 Burr. 1603

1 Rol. Abr. 665. 4 Co. 49. b. 1 Jones 132. Latch. 129.

So the lord may diſtrain for relief—*aid* (*a*) *pur file marrier*, and *pur faire fitz chevalier*. For though theſe were not annual, yet they were parts of the feudal profits, and were therefore recoverable in the ſame manner.

But it may be neceſſary to diſtinguiſh relief, into the relief proper and improper.

Co. Lit. 83. a. Spel. Rem. 32. 1 Jon. 132. Latch. 130. 3 Bulſt. 323. Run. edit. of Hale.

The PROPER relief is the ancient relief, which was due to the lord at or before the entry of the heir, or new tenant, into the land. This was anciently paid in money, and was not ſo properly a ſervice, as a perquiſite or incident to the feudal tenure. It aroſe from this, that whilſt the feud was temporary and precarious, the lords uſed upon the death of their tenants, and before the heir was admitted into the feud, to oblige the heir to pay a ſum of money. This, after the feud came to be eſtabliſhed, and made perpetual, came to be part of the feudal profits; the tenants eaſily conſenting to it upon the eſtabliſhment of the feud.

In analogy to this, the lords, after *magna charta* had indulged to the tenants the licence of alienation, uſed in their grants to reſerve a ſum of money on every alienation of their tenants; and where ſuch reſervation appeared in their grants, with a clauſe of diſtreſs, the lord might reſort to that remedy where the tenant failed to perform his part of the contract. It afterwards happened that

(*a*) The aids *pur faire fitz chevalier et pur faire file marrier*, are *expreſsly* aboliſhed by 12 Car. 2. c. 24.

the

the grants in which theſe reſervations appeared, were by length of time worn out or loſt, and then the lords PRESCRIBED in taking the relief. But for theſe preſcriptive reliefs, the lord could not diſtrain, unleſs he could likewiſe preſcribe in the diſtreſs. For as the preſcription created the right to this IMPROPER relief, ſo there muſt be a preſcription to give the remedy; otherwiſe they were looked upon as burdens and exactions of the lords upon their tenants, tending to diſable them from appearing in the field, armed and equipped for the public ſervice: and for that reaſon were ſaid to be againſt common right: that is, againſt the policy of the law, which provided for the public ſafety, before the private profit of the lord. And therefore they were not encouraged, nor any remedy either by diſtreſs, or action, given for them, unleſs the lord could ſhew as early a title to the remedy, as to the duty itſelf.

In like manner the heriot is of two ſorts; the heriot ſervice and the heriot cuſtom.

The heriot NOW is the BEST BEAST (*a*) of the tenant, but anciently was taken out of the *militiæ apparatus*. It was a device firſt introduced to keep a conquered nation in ſubjection, and to ſupport the publick ſtrength Spelm. Rem. 32.

(*a*) A heriot is the beſt beaſt *or other thing* due to the lord upon the death or alienation of his tenant. 2 Com. Dig. 405. tit. Copyhold, (K) 18. 2 Black. Com. 97.

But the lord ſhall have that which he chooſes for the beſt, though it be the worſt. Hob. 60.

In ſome manors it is the beſt chattel, piece of plate, &c. Kitch. 133. 2 Black. Com. 422. 3 Bac. Abr. 48.

and

and military furniture of the kingdom, by taking on the death of the tenant his beſt armour. Hence it became part of the ſervices ariſing from the tenure, and therefore to be diſtrained for as other ſervices. This, as the military ſervice declined, was turned into ſomething of private profit to the lord; and inſtead of the *militiæ apparatus*, he took the beſt horſe, ox, or cow; and the ſame remedy was continued, as where the heriot was paid in the habiliments of war.

Bro. Abr. tit. Heriot, pl. 7, 8. Keilw. 82. a.

The reſervation of this heriot ſervice was of public utility. It was alſo for the private ſafety of all the tenants in the manor, that the habiliments of war ſhould be kept amongſt themſelves for their defence; and therefore where there was no ſuch tenure between the lord and tenants of ſome particular manor, the tenants by agreement conſented that the lord ſhould have the beſt part of the military furniture. This agreement created a cuſtom, which being the law of the manor, created a right in the lord to ſeize.

But the lord could not diſtrain; becauſe wherever there were any footſteps of a diſtreſs, it was always ſuppoſed to be part of the feudal reſervation: and the heriot cuſtom ariſing originally from the grant of the tenant, and not being reſerved by the lord upon his feudal donation, was not a ſervice ariſing from the tenure between lord and tenant; and therefore was not under the regulation of feudal ſervices, and conſequently not to be diſtrained for, as ſuch ſervices were.

But where ſuch heriot cuſtom obtains, the property of the heriot is actually in the lord upon the death of the tenant; becauſe the choice of the beſt beaſt is in the lord, and not in the tenant. And hence it is, that the lord may ſeize the heriot cuſtom wherever he finds it, either on the tenant's land, or off it, or even in the king's highway. And if it be eloigned he may have treſpaſs or detinue for it; for the bringing the action determines the choice for that beaſt, as if he had ſeized at firſt; and whoever takes it, violates the property, which was veſted in the lord by the death of the tenant. But in the caſe of ſuch eloignment the lord cannot diſtrain the tenant, as he may for the heriot ſervice; becauſe the diſtreſs was introduced for the recovery of feudal duties, of which the heriot cuſtom is no part.

Keilw. 82. a. Bro. Abr. tit. Heriot, pl. 7. Show. 81. Salk. 256. Cro. Car. 260.

But it hath been much doubted whether the lord might SEIZE the heriot SERVICE; becauſe that being part of the feudal duties ariſing from the tenure between the lord and tenant, ought to be governed by the ſame regulations with the other ſervices; and therefore where the tenant holds by a capon, or a hen, *&c.* the lord muſt diſtrain, and cannot ſeize as for his own property; ſo neither ought he to ſeize for a heriot ſervice. But it now ſeems to be ſettled, that the heriot ſervice is ſeizable, as well as the heriot cuſtom; becauſe the choice of the beſt beaſt is in the lord, and therefore he only is to determine that choice by a ſeizure (*a*). But where the

Plowd. 96. Keilw. 82. a. Bro. tit. Heriot pl. 7. 3 Bulſt. 325. Dr. & Stud. 74. Moor 540. Cro. Eliz. 32. Show. 81. 2 Lutw. 1367. 3 Mod. 231.

(*a*) And where the lord is intitled to ſeize a heriot, he may ſeize it wherever he can find it, whether on the land or not. 3 *Mod.* 231. 1 Show. 81.

tenure

tenure is by the rent of a hen or a capon, *&c.* he is to render, and therefore the lord can only compel him to do it by diſtreſs. [But a ſuit heriot reſerved by deed, cannot be taken off the manor. 1 *Show.* 81.]

Cro. Jac. 382. 1 Ro. Abr. 664. 8 Co. 8. 41. 11 Co. 45.

2dly. The ſecond ſort of diſtreſs is for fines and amerciaments in court leets. This ſtands upon a different bottom. The former diſtreſs only relates to private contracts between landlord and tenant; this diſtreſs relates to tranſactions in a court of juſtice, and is allowable either for a fine impoſed by the ſteward, or for amerciaments aſſeſſed by the jury on perſons guilty of nuiſances; or for any other crime preſentable or conuſable in the leet.

3 Com. Dig. 108. tit Diſtreſs, (A.) 1.

"In the caſe of common perſons there ought to be a cuſtom alledged for diſtraining for ſuch amerciaments, but it is otherwiſe in a leet of the king."

But for amerciaments in a court-baron, the lord cannot diſtrain, but is put to his action of debt for recovery thereof.

To underſtand this rightly, we muſt obſerve that court leets were originally derived out of, or rather exemptions from, the ſheriff's torn, and therefore are courts of record, as the torn is.

In thoſe leets, though the lord or his ſteward preſides as judge, yet the court is *curia domini regis*, and was at firſt eſtabliſhed to puniſh treſpaſſes and public nuiſances, which aroſe within the precincts of the leet, as the torn

torn through the whole county. Hence it comes that in all things neceſſary for the ſupport of the juriſdiction of the court, the judge was armed with the ſame power with the judges above; and therefore the ſteward for any contempt in court might impoſe a fine, and impriſon for it, as the judges above:—becauſe, what is neceſſary for the vindication of the honour of the court, the ſteward is not obliged to go to a ſuperior court to ſeek redreſs for. But for an amerciament, which is impoſed for a tranſgreſſion out of court, of which the court has cognizance, there was no fine or impriſonment; becauſe that court could only try leſſer offences, which were not fineable; the greater offences being remitted to the juſtices in eyre. This fine for contempt in court, when impoſed, being grounded on the judgment of the king's court of record, CREATED A DEBT, for which the ſteward might either impriſon, or levy the ſame on the goods and chattels of the debtor; but for the amerciaments the ſteward could only DISTRAIN, and not fine and impriſon.

The proceſs that levies this debt, is in the books called a diſtreſs; becauſe the lord might at common law impound the diſtreſs until the fine was paid;—but as the *diſtringas* or *levari* for levying thoſe fines and amerciaments iſſued in the king's name; and as the lord may likewiſe ſell this diſtreſs, it is rather to be eſteemed IN THE NATURE OF AN EXECUTION, than a diſtreſs, in the genuine ſenſe of the word;—the diſtreſs originally being no more than a pain on the tenant, and a pledge in the lord's hands to compel the tenant

Dal. Sher. 401. Finch. 125. 8 Co. 41. b.

tenant to perform the ſervices,—and therefore could not be ſold,—till the ſtat. 2 *W. & M. c.* 5.

[That a power to ſell the goods diſtrained for rent, ſo neceſſary to make the rent effectual, ſhould not have been introduced at a more early period, is ſomewhat ſurprizing.]

5 Co. 38. 41. And hence it hath been held, that the ſteward may impoſe a fine upon a man for refuſing to be ſworn a conſtable, and may diſtrain for that fine.

Dalt. Sher. 400. So if a man oweth ſuit to the ſheriff's torn, and refuſeth to be ſworn, or if a bailiff of a leet refuſeth in court to execute his office; theſe are all contempts to the authority of the court; and the ſteward may impoſe a fine, and levy it by diſtreſs of the offender's goods.

Dalt. Sher. 401. Bro. tit. Diſtr. pl. 8. Fitz. Abr. tit. Avowry, pl. 194. So if a man oweth ſuit to the ſheriff's torn, and doth not make his appearance, he may be amerced and diſtrained for the ſame; becauſe it is a contempt to the court in refuſing obedience to their lawful commands. But *qu.* whether this be properly an amerciament.

The difference between fines and amerciaments is, that the fine was *pro gravioribus delictis*,—the amerciament *pro minoribus*.

The *graviora delicta* were puniſhed either by the view of the judge himſelf, as fines for contempts done in courts, or on a view of nuiſances; but out of court by the juſtices of the

the peace, or upon indictment, or other conviction.

Of ſuch *graviora delicta*, the fine is ſet by the court itſelf, becauſe ſuch *graviora delicta* muſt be againſt the king's peace, the quantity of which the court are judges of, who have commiſſion from the king to ſee that ſuch peace be preſerved. In ſuch caſes, the jury are only judges whether the defendant be guilty of the fact or not; but the court is judge of the quantity of the fine. It is called a fine, becauſe it ends with the court, and is not to be affeered by the jury.

In *minoribus delictis*, as for not appearing at the court leet, or torn, the judge may order the jury to affeer an amerciament on ſuch a defaulter, and iſſue a *diſtringas* for levying the ſame.

"To make this amerciament legal, it ought to be aſſeſſed by the court, and not by the jury, and affeered by the jury: for an avowry under a diſtreſs for an amerciament has been held ill, becauſe it repreſented the amerciament to have been made by the jury; and a juſtification in treſpaſs under ſuch a diſtreſs has been held ill, becauſe it did not ſhew the amerciament had been affeered." 4 Com. Dig. 139, 140. Stephens v. Houghton M. 3 G. 2. 3 Lev. 19.

But it ſeems that at the aſſizes and ſeſſions, where the judges and juſtices ſit by an immediate commiſſion from the king to keep the peace of the county, the non-appearance of ſuitors to make enquiries for breaches of the peace is among the *graviora delicta*;—ſo that there the court hath power of itſelf to impoſe

poſe a fine, which muſt be eſtreated into the exchequer to be levied.

And ſo where the king grants to any corporation a power to hold ſeſſions, if ſuch court fines for non-appearance, ſuch fines muſt be eſtreated into the exchequer, and levied by the proceſs of that court; and ſuch corporation, though they have the grant of ſuch fines from the crown, cannot get them out of the exchequer but by petition, or *monſtrans de droit*.

And if inſtead of fining ſuch perſons, the ſeſſions order that they be amerced, and the jury affeer the amerciaments, they may be levied by *diſtringas*.

Cro. Eliz. 748. But court barons were inſtituted for the private advantage of the lord, and the eaſe of the tenants of the manor;—*curia domini manerii*, in which the ſuitors are judges; and their amerciaments being impoſed only for the lord's advantage, and for not doing ſuit to his courts, or performing the ſervices due to him, ſuch amerciaments are not grounded on the judgments of the king's courts, or courts of record; and therefore only created a debt for the lord, to be ſued for in the king's court, that the juſtice of it might be there CONTROVERTED; for which reaſon the law never allowed the lord to diſtrain for thoſe amerciaments in either of the ways abovementioned. For the lord ought not to have a diſtreſs for them in the nature of an execution, becauſe that were to alter property without the king's writ, or the proceſs of the king's courts. Nor was it reaſonable to

to allow the lord to diſtrain and impound for theſe amerciaments, becauſe they were ſet, among other cauſes, for not doing ſuit to the lord's court and other ſervices ariſing from the feudal tenure, and were in nature of a penalty inflicted on the tenant for the non-performance thereof; for which the lord might diſtrain by virtue of the feudal grant, and therefore ought not to diſtrain for the amerciament too. That were in effect to allow the lord a double diſtreſs for the ſame thing;—for the ſervice itſelf, and for the amerciament; which is the penalty for the non-performing that ſervice; which were vexatious, and would put the tenant too much in the power of the lord.

But if the lord can PRESCRIBE in a diſtreſs for the amerciament, then the diſtreſs becomes lawful; becauſe ſuch a preſcription is preſumed to be founded on a grant of the tenants, by which they ſubjected themſelves to the diſtreſs. And though the grant which created the diſtreſs, be worn out by length of time, yet the continual uſage is good evidence of it; and therefore the tenants muſt ſubmit to that cuſtom which their anceſtors have put them under. 11 Co. 45. a. Ro. Abr. 666.

But if the manor belongs to the crown, the king by his prerogative may diſtrain the tenants for amerciaments impoſed in his court baron, without preſcription; becauſe it is of publick advantage that the king's treaſure ſhould be collected in the moſt expeditious manner. Cro. Eliz. 748. Rowleſton v. Alman.

There is however, this diſtinction to be obſerved in fines impoſed by a court leet. They are either impoſed by a ſteward for a contempt to the court,—and this is abſolutely neceſſary for the ſupport of the authority and dignity of the court within the boundaries of its duty;—or elſe they are impoſed as a puniſhment for thoſe crimes which are conuſable by the court. But where by cuſtom the leet hath juriſdiction to impoſe a fine, for a thing not originally within the juriſdiction, but only acquired by cuſtom, in ſuch caſe, as that particular cuſtom gave the leet a right to impoſe the fine, ſo the cuſtom only can create the right of diſtreſs.

Vent. 105. Pierſon v. Ridge. Raym. 204. S. C.

Thus where a leet laid a cuſtom for a townſhip to ſend one to be ſworn conſtable, which not being done, a fine was impoſed, and a diſtreſs taken for it, the diſtreſs was held unlawful; becauſe there the ſteward of the leet did not preſcribe in the diſtreſs, and nothing elſe could warrant it.

11 Co. 44. b. Rol. Rep. 32. Godfrey's caſe. 2 Leon. 74. 3 Leon. 178.

So it is, *pro certo letæ*; which was a ſum given by the tenants to reimburſe the lord for the purchaſe of the leet; and for this the lord cannot diſtrain without a cuſtom to warrant the diſtreſs; becauſe this is a ſum purely of private advantage to the lord, and in no ſort neceſſary to be paid to keep up the juriſdiction of the court.

8 Co. 41. b.

But for fines and amerciaments in leets, the lord may either diſtrain and ſell the diſtreſs, and then the diſtreſs is in nature of an execu-

execution, of the judgment of a court of record; or elſe he may impound the diſtreſs, and then it is repleviſable.

Here it may not be improper barely to mention another ſort of diſtreſs, which is the laſt and great proceſs in courts of judicature, to bring the defendant into court, and oblige him to appear in civil caſes, in actions as well real as perſonal.

This proceſs is the attachment, which lies as well in inferior courts, not of record, as in ſuperior courts; and it is given when the defendant has been ſummoned to appear and makes default (*a*). And it is not a proceſs againſt the body of the defendant, but againſt his goods and chattels; for the officer attaches the defendant by his horſe, his ox, or his cow. And where this proceſs iſſues out of a court of record, there is no doubt but if the defendant makes default, the goods he was attached by are forfeited, becauſe in ſuch caſe there is a judgment of the king's court of record condemning the goods, which alters the property.

Dalt. Sher. 417. Booth 8. Dyer 199. pl. 54.

And it ſeems that in the county court and court baron, which are not courts of record, if the defendant does not appear upon the

Kitch. 155. Dalt. 418. Bro. tit. Court Bar. pl. 1.

(*a*) An attachment is in many actions the firſt proceſs. 3 Bl. Com. 280.

A *Diſtringas* is the proceſs which iſſues, if the defendant does not appear at the return of the ſummons, or attachment; and it is called diſtreſs infinite, becauſe it goes till appearance. 4 Com. Dig. 448. tit. Proceſs. (D.) 7.

attachment or diſtreſs, the goods by which he was attached or diſtrained, are likewiſe forfeited on his default. The reaſon why in this ſingle inſtance the property is altered without the king's writ, or the judgment of a court of record, ſeems to be, for the more ſpeedy adminiſtration of juſtice, which is of publick advantage; and the party by his appearance might have prevented the forfeiture.

And here we may likewiſe obſerve, that where the plaintiff recovers in the county court, or court-baron, the execution is only BY DISTRESS; that is, there iſſues a precept to the officer of the court to take the goods of the defendant, and keep them in pound, until the defendant ſatisfy the plaintiff his debt. The reaſon is, becauſe theſe are NOT courts of record; being held only in the lord's or ſheriff's name; and therefore all the proceſs run in their names and not in the king's, and without the king's writ no property can be altered. So that the execution in theſe inferior courts, only ſeizes and DETAINS the defendant's goods until he makes the plaintiff ſatisfaction for his debt. We find therefore in the Regiſter, the king's writ *de executione judicii* of theſe inferior judgments, and by virtue of that they may levy the plaintiff's debt as if he had recovered it in a court of record.

In the lord's court, if the defendant does not appear to do juſtice to the complainant on the ſummons, on the next proceſs he ought to give pledges, or caution for his appear-

appearance; and therefore upon the attachment they may return him attached *per plegios*; and then if he don't appear, his pledges ſhall be amerced; for which amerciament the lord may have his action of debt. If the defendant cannot find pledges, the attachment is *per vadios*; and ſince the lord would have had the amerciament if the defendant had been attached, by pledges, and had not appeared, therefore if he be attached *per vadios*, and do not appear, the *vadii* are forfeited; for the *vadii* come inſtead of the *plegii*, and therefore are hypothecated for his appearance in judgment of law. And by conſequence, if he doth not appear to perform the condition of ſuch pignoration, the *vadii* are forfeited; and therefore the defendant, where he is attached *per vadios*, may before the day of his appearance replevy the *vadios*, and put in pledges who are anſwerable for his appearance, and if he makes default are amerced.

But if there be a *levari facias* for a debt recovered in the lord's court, there the goods are not forfeited on the return; becauſe after judgment he hath no day to appear; and therefore there can be no forfeiture ariſing to the lord nor the party: inaſmuch as he was not bound by his fealty to do any ſuch act to the party recovering, and conſequently here the lord only ſeizes the chattels of his tenant to make him pay his debts. But the plaintiff muſt apply to the king's court to have the property altered by a writ *de executione judicii*, and ſo hath a compleat remedy for his demand.

But if the *vadii* were not to be forfeited on meſne proceſs, the tenant would let ſuch goods lie till at his leiſure he could come in to conteſt the debt, which would tend to the delay of juſtice.

And here, note by the way, that the lord's diſtreſs for rent is in nature of a prerogative proceſs, to take the goods and chattels of his debtor in the firſt inſtance without any ſummons; but at the next court day ſuch diſtreſs is not forfeited to the lord, if not replevied; becauſe then he would judge of forfeitures in his own cauſe.

But if the tenant was aggrieved he muſt apply to the king who is the lord paramount; and the complaint is, that he was diſtrained *contra vadios & plegios*; that is, when he was ready to give good ſecurity to conteſt the lord's debt;—and therefore the judgment in replevin is of return irrepleviſable; that is, that the lord has a juſt cauſe to detain,—that ſuch prerogative of the lord's ſhould take place till the debt be ſatisfied.

3dly. A third caſe where a diſtreſs lies is, for toll in a fair or market.

Ro. Abr. 666. Raym. 233. Hob. 187.

And here the law is clear, that where a lord hath a fair or market by preſcription, and hath uſed to take toll of cattle ſold, if ſuch toll be not paid, the lord may ſeize any of the cattle ſo ſold, and retain them till ſatisfaction be made him for the toll. For the preſcription is built on a grant of the KING, which

which by length of time is ſuppoſed to be worn out; and that grant was originally made for publick utility; fairs and markets being inſtituted for the more convenient ſupplying the ſubject with the neceſſaries and conveniences of life. And therefore every ſubject that buys there, may very reaſonably be charged for that conveniency with a moderate toll; and the lord hath the advantage of the toll, as a compenſation for the miſchief done to his ſoil by the beaſts ſold. And as the lord might have diſtrained the beaſts for *damage feaſant*, if he had not ſuch fair, ſo he may diſtrain for the toll, which is in nature of a compenſation for that damage (*a*). Hence it ſhould ſeem reaſonable, that where the fair or market ſubſiſts merely by grant from the crown,—as where the fair is newly created by grant,—and toll thereby given to the grantee, that he may diſtrain for ſuch toll; for *qui ſentit commodum ſentire debet & onus*; and an action of debt would be no remedy. But THIS diſtreſs is only a pledge to be DETAINED till ſatisfaction made, and doth not ſeem to be within the ſtatute to be ſold.

"But the owner of the ſoil on which a market is held cannot diſtrain goods as *da-* Wigley v. Peachy, Ld. Raym. 1589.

(*a*) But it is not to be ſuppoſed from hence, that the perſon intitled to toll is always the owner of, or intitled to the ſoil, for the toll may belong to one man, while the ſoil belongs to another, and if a fair or market with toll therein is granted in *Borough Engliſh* land, the heir at common law ſhall have the fair or market, and the toll, and the heir by the cuſtom the ſoil. *Moor* 474. 1 *Wilſ.* 115. The only compenſations which the owner of the ſoil, as ſuch, is entitled to, ariſe from *Piccage* and *Stallage*, *ib.*

mage feaſant, which are laid down there for ſale, tho' the owner of them has not paid him any recompence for laying them there."

Blakey v. Dinſdale, Cowp. 661.

"Nor can a diſtreſs be taken for goods fraudulently ſold out of a market to avoid the toll:—As where a corporation claimed toll of all corn brought into the borough for ſale on a market day with power of diſtreſs; and *A.* on a market day ſold an inhabitant a quantity of corn, which lay ten miles off, by ſample, and on a ſubſequent market day ſent it through the borough to the vendee's mill; and the toll gatherer followed the waggon to the mill, and there ſeized the toll. On an action of treſpaſs brought againſt him, the Court held the caſe not within the corporation's claim, that extending to ſuch corn only as was brought into the borough for ſale *in futuro*, and the corn itſelf in queſtion, when brought into the borough, being actually ſold: though the Court intimated that if the fraud could be made appear, the remedy would be a ſpecial action on the caſe."

Dr. & Stud. Dial. 2. cap. 9.

4thly. If a townſhip be amerced, and they by conſent aſſeſs a certain ſum on every inhabitant for the raiſing thereof, and likewiſe agree that if it be not paid by ſuch a day, that certain perſons appointed for that purpoſe by the townſhip ſhall diſtrain for the ſum aſſeſſed on each inhabitant;—this is a lawful diſtreſs; becauſe conſented and ſubmitted to by the agreement of thoſe perſons who are to pay the tax. It is the more reaſonable, becauſe the raiſing the tax in that

that manner is for the eaſe of the inhabitants; in regard the publick officer muſt otherwiſe levy and collect the amerciaments.

5thly. A penalty inflicted for a breach of a by-law may be levied by diſtreſs; but this only in caſe where ſuch remedy IS APPOINTED for recovery thereof by the power that made the by-law, and at the time the by-law was made;—becauſe the by-law only binds the members of that community who make the law, and therefore the aſſent of every member is preſumed in the inſtitution of that law; and conſequently the penalty may be recovered by diſtreſs where the parties themſelves have agreed to that remedy. But unleſs the diſtreſs be EXPRESSLY provided for by the corporation, the penalty can be recovered only by action of debt (*a*). The ſubject cannot be impriſoned for the breach of any by-law, though it be ſo expreſsly ordained by the power that made the by-law, becauſe ſuch impriſonments are againſt *Magna Charta*, and therefore the by-law appointing it is ſo far void, as being againſt the law of the land.

5 Co. 64. a. Clarke's caſe, Ro. Abr. 366. Dyer 321. pl. 33.

But where the corporation can preſcribe in the diſtreſs, they may lawfully diſtrain for the penalty; becauſe the preſcriptive right is grounded on a by-law originally appointing that remedy for recovery of the penalty, and

(*a*) And tho' a by-law may authorize a diſtreſs to inforce payment of the penalty, yet it cannot authorize the ſale of ſuch diſtreſs. Ld. Raym. 92. 1 Wilſ. 237. Lutw. 1320. 5 Co. 64. a. 2 Ventr. 282.

therefore

therefore is good; though the by-law on which it is grounded be by length of time worn out or loſt.

Fleta 101. Bro. tit. Diſtr. pl. 3.

6thly. A man may diſtrain beaſts *damage feaſant*. This, according to *Fleta*, is grounded on a particular cuſtom of the realm. *Si dicere poterit captor*, ſays he, *quod juſte cepit averia quia invenit illa in terrâ ſuâ, & ſecundum conſuetudinem regni imparcavit illa, donec damnum ſuum fuerit emandatum.* But from whence this notion was borrowed, or whenever it was introduced, it is highly reaſonable that the owner of the land ſhould defend himſelf from injury by driving out the beaſts, and likewiſe by detaining the thing that did the injury, in a public pound, till compenſation be made for the treſpaſs; for otherwiſe he might never find the perſon whoſe beaſts committed the treſpaſs.

30 E. 3. 27.

[A commoner may juſtify the taking of a STRANGER'S cattle, *damage feaſant*, upon the common. And this was admitted in a late caſe, where the queſtion upon an avowry for *damage feaſant*, was, "Whether one com-
"moner can diſtrain another commoner's
"cattle, with which he has overcharged the
"common beyond his ſtinted number of cat-
"tle;" and in that caſe it was determined, that SUCH a right to diſtrain turns upon this diſtinction—That wherever there is a COLOUR of right for putting in the cattle, a commoner cannot diſtrain; becauſe in ſuch a caſe it would be judging for himſelf; and that in a queſtion which depends upon a more competent enquiry, by aſſiſe, by a writ of admeaſurement,

4 Burr. 2426.

meaſurement, or by an action on the caſe for ſurcharging the common (*a*). But where the cattle are put upon the common WITHOUT ANY COLOUR or pretence of right, there the commoner may diſtrain them; and upon that ground he may diſtrain the cattle of a ſtranger.]

"And it has been determined in a late caſe that one commoner may diſtrain the cattle of another commoner, where there is a covenant not to put on their cattle but at ſtated times, if either breaks that agreement." Whiteman v. King, 2 H. Bl. 4.

"Thus where *A.* being poſſeſſed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having alſo a right of common over the whole field, entered into an agreement for their mutual advantage and convenience, not to excerciſe their reſpective rights for a certain term of years, and each party covenanted to that effect; the Court held that *A.* might diſtrain *B*'s cattle *damage feaſant* for coming upon his land during the term."

"And where the lord may put cattle upon the common, a commoner cannot diſtrain his cattle, tho' he ſurcharges, unleſs at times in Burr. 2430. Truelock v. White, 5 Vin. 35.

(*a*) And a commoner who has himſelf ſurcharged, may nevertheleſs maintain this action againſt another commoner for ſurcharging the common. Hobſon *v.* Todd, 4 Term Rep. 71.

But if a commoner turns ſupernumerary cattle on the common by the licence of the lord, another commoner cannot maintain an action on the caſe againſt him for ſurcharging, becauſe he is not the wrong-doer. 4 Term Rep. 73. Burr. 2428.

which

which by the cuſtom the common ought to lie freſh, and then the Court ſeemed to think a cuſtom and uſage to do it ought to be alledged."

Yelv. 129.

Co. Lit. 161. 12 Mod. 661.

[But if a man come to diſtrain, and ſee the beaſts on his ground, and the owner chaſe them out before the diſtreſs be taken, though it be of purpoſe to prevent the diſtreſs, yet the owner of the ſoil cannot diſtrain them; and if he doth, the owner of the cattle may reſcue them; for the beaſts muſt be *damage feaſant* at the time of the diſtreſs.]

Bull. N. P. 61. 5th edit.

"And if they were *damage feaſant* yeſterday, and again to-day, they can only be diſtrained for the damage they are doing when they are diſtrained."

12 Mod. 660.

[And if many cattle are doing damage, a man cannot take one of them, as a diſtreſs for the whole damage; but he may diſtrain one of them, for its own damage, and bring an action of treſpaſs for the damage done by the reſt.]

II. "Who in reſpect of his eſtate or intereſt may diſtrain."

Litt. ſ. 214. 2 Bac. Abr. 106.

"If a perſon ſeiſed in fee grants out a leſſer eſtate, ſaving the reverſion to himſelf, with a reſervation of rent, or other ſervices, the law gives him, without any expreſs proviſion, remedy for ſuch rent or ſervices by diſtreſs."

"But

"But for a rent which iſſues out of an incorporeal inheritance, the reverſioner cannot diſtrain; as if I have a right of common in another man's ſoil, and I grant it to *A.* reſerving rent, if the rent be behind I cannot diſtrain the beaſts of *A.* becauſe that the right of common, which every man has, runs through the whole common." Co. Litt. 47. 142. a. 2 Bac. Abr. 106.

"But Lord *Coke* confines this rule to common perſons, becauſe the king may reſerve rent out of an incorporeal inheritance, the reaſon of which is, that *he* by his prerogative can diſtrain on all the lands of his leſſee." 4 New Abr. 192. 339. Co. Litt. 47. a. Hargr. n. 1.

"So a man cannot diſtrain for a rent iſſuing out of tithes, becauſe there is no place where the diſtreſs can be taken." Cro. Jac. 111. 173.

"A perſon who has not the reverſion, cannot diſtrain of common right, but he may reſerve to himſelf a power of diſtraining, or the reſervation may be good to bind the leſſee by way of contract, for the performance whereof the leſſor ſhall have an action of debt." 2 Bac. Abr. 106.

"Thus if the aſſignee of a term ſurrenders to the original leſſor, tho' he reſerves a groſs annual payment, he cannot diſtrain for that, or for the original rents, for he has no privity of eſtate." Smith v. Mapleback, 1 Term Rep. 441.

"So if a leſſee for years aſſigns his term rendering rent, he cannot diſtrain for it without a particular clauſe for that purpoſe, becauſe he has no reverſionary intereſt; the only remedy 2 Lev. 80. Co. Lit. 292. Cooper's caſe, 2 Wilſ. 375.

medy the aſſignor has, is by an action on his contract."

Fairfax v. Gray, Bl. 1326. "But if an annuity is granted out of an eſtate, and the grantor to ſecure the payment veſts the eſtate in truſtees for a term to the uſe of the annuitant, and ſubject thereto continues in poſſeſſion, the annuitant may diſtrain for the arrears, for ſuppoſing the term to have veſted the legal poſſeſſion in him, the grantor is to be conſidered as his under-tenant upon whom he might, without any clauſe for that purpoſe, diſtrain at common law."

Shep. Touchſtone, 439. "If a man deviſes a rent out of his land and charges the land with a diſtreſs, the deviſee may make uſe of that remedy and diſtrain for the rent; but unleſs the power is given him by the will, he may not diſtrain for it."

Co. Litt. 169. b. "For a rent granted for equality of partition by one coparcener to another, or for a rent granted to a widow out of lands whereof he is dowable in lieu of dower, or for a rent granted in lieu of lands upon an exchange, the grantee may diſtrain without any proviſion of the parties, though he has no reverſion, the law giving a diſtreſs in theſe caſes, leſt the grantee ſhould be without remedy."

Ognal's caſe 1 Vaugh. 40. "If a man ſeiſed in fee or for life of a rent charge, after arrearages incur, grants over the rent to another, he cannot diſtrain for theſe arrearages, becauſe they are by the grant divided from the freehold of the rent."

"A mort-

"A mortgagee after giving notice of the mortgage to the tenant in poſſeſſion under a leaſe prior to the mortgage may diſtrain for the rent in arrear at the time of the notice, (although he was not in the actual ſeiſin of the premiſes or in the receipt of the rents and profits at the time it became due,) as well as for rent which may accrue after ſuch notice, the legal title to the rent being in the mortgagee."

Moſs v. Gallimore, Dougl. 278.

"So if a perſon enters upon certain premiſes ſubject to the approbation of the landlord, who afterwards does not approve, but upon an agreement that the tenant will pay an advanced rent as well for the time he had been in poſſeſſion, as for the future, the landlord was willing to let him continue in poſſeſſion; in ſuch caſe the landlord may diſtrain for the advanced rent accrued before the agreement as well as for what accrues afterwards, ſuch agreement giving him the ſame power by relation, to his tenant's firſt entry into poſſeſſion, as it did to recover his rent in future."

Mc. Leiſh v. Tate, Cowp. 784.

"A receiver appointed by the Court of Chancery might diſtrain for rent, where he he ſees it neceſſary, and need not apply firſt to that court for a particular order for that purpoſe; becauſe as that court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the eſtate to wait till that time, as it would give the tenant an opportunity of conveying his goods off the premiſes in the mean time."

1 Atk. 750. Pitt v. Snowden 3 Bro. Ch. Ca. 87. Hughes v. Hughes.

"But if there is any doubt who has the legal right to the rent, then the receiver ſhould make an application to that court for an order, as he muſt diſtrain in the name of the perſon who has that right."

Harriſon v. Barnby 5 Term Rep. 246.

"One tenant in common may diſtrain for his ſhare of the rent upon a terretenant holding under him and another tenant in common, if the terretenant pays the whole rent to the other, after notice not to pay it in that manner."

2 Leon. 196. C. B. M. 29 Eliz.

"A man may diſtrain cattle without any expreſs authority, and if he obtains the aſſent of the perſon in whoſe right he did diſtrain, his aſſent will be as effectual as his command could have been; for ſuch aſſent ſhall have relation unto the time of the diſtreſs taken."

"By the common law executors or adminiſtrators of a man ſeiſed of a rent ſervice, rent-charge, rent-ſeck, or fee farm, in fee ſimple or fee tail, could not diſtrain for the arrearages incurred in the life-time of the owner of ſuch rents, it was therefore enacted by 32 *Hen.* 8. *c.* 37. *ſ.* 1. That the executors and adminiſtrators of tenants in fee, fee tail, or for life, or rent ſervices, rent charges, rent-ſeck and fee farms, may diſtrain upon the lands chargeable, ſo long as they remain in the poſſeſſion of the tenant who ought to have paid; or of any other perſon claiming under him by purchaſe, gift or deſcent. *Sect.* 3. gives the like remedy to huſbands entitled in right of their wives after the

the deaths of their wives. *Sect.* 4. gives the like remedy to tenants *pur auter vie* after the death of the *ceſtui que vie.*"

"Lord *Coke* ſays that the preamble concerning the executors and adminiſtrators of tenant for life is to be intended of tenant *pur auter vie*, ſo long as *ceſtui que vie* lives: however, in *Hoole* v. *Bell* it was adjudged that this ſtatute being remedial, extends to the executors of all tenants for life, as well to thoſe executors who before the ſtatute were entitled to an action of debt, as to thoſe executors who had no remedy whatever; and Mr. *Hargrave* in a note adds, that ever ſince this caſe he apprehends the law to have been taken accordingly." 1 Ld. Raym. 172. Co. Litt. 162. b. n. 1. 13 Ed.

"But in a caſe where a tenant for life of a rent-charge confeſſed a judgment, which was extended by *elegit*, and the tenant for life dying, the conuſee diſtrained, and in replevin avowed for the arrears incurred in the life of the tenant for life; upon demurrer the diſtreſs was holden to be bad, and not warranted by the ſtatute; firſt, becauſe the caſe of the conuſee is not enumerated in it; ſecondly, becauſe he comes in in the *poſt*, and not under the tenant for life." Bull. Ni. Pri. 5 Ed. 56.

"Neither is the executor of a grantee of a rent charge for divers years, if he ſo long live, within the ſtatute." Bull. Ni. Pri. 5 Ed. 57.

"It has alſo been held that this ſtatute does not extend to copy-hold rents, but only to rents out of free land." Yelv. 135.

"Lord

Bull. Ni. Pri. 57. 5 Ed.

"Lord *Coke* ſays if a man makes a leaſe for life, or a gift in tail, reſerving rent, this is a rent-ſervice within the ſtatute, from whence it may be inferred, that he thought that a rent reſerved upon a leaſe for years was not within it, and I apprehend that it is not, for the landlord is not tenant in fee, fee-tail, or for life of ſuch a rent; and it is the executors of ſuch tenants only who are mentioned in the act. However in treſpaſs, where it appeared the defendant had diſtrained the plantiff's goods for rent due to his teſtator upon a leaſe for years, Lord Chief Juſtice *Lee* held it to be within the ſtatute, and the defendant obtained a verdict."

Powel v. Killick, at Weſtminſter, M. 25 G. 2.

III. What things are diſtrainable.

Bro. tit. Diſtr. pl. 8.

The diſtreſs, as is already obſerved, was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the ſervice, or perform the duty, for which it was taken; and therefore at common law could not be ſold, but like all other pawns or pledges was to be reſtored to the owner when the ſervice or duty was performed.

The nature then of contracting by pawns or pledges being, that upon payment of the money for ſecurity whereof they were given, the pawn or pledge ought to be reſtored to the owner in the ſame plight and condition it was delivered; it follows, that MONEY cannot be diſtrained, except it be in a bag; for then the knowledge of the

Rol. Abr. 666. (H.) pl. 4. 2 Bac. Abr. 109.

bag, eſpecially if it be ſealed, ſufficiently ſecures the ſeveral pieces of money therein, ſo as the ſame individual pieces may be reſtored on redemption of the pledge.—

[So milk, fruit, &c. cannot be diſtrained.]

So ſheaves of corn, at common law, could not be taken as pledges for rent; becauſe all pledges were to be returned in the ſame plight and condition as they were in when taken; but theſe ſhed and ſcatter the grain by being removed, and conſequently cannot be reſtored in the ſame condition upon the redemption. For the ſame reaſon, corn or hay, in a cock or barn, could not be diſtrained at the common law. Yet, at common law, corn or hay IN A CART might have been diſtrained, together with the cart itſelf; becauſe then the pledge might have been removed without damage to the owner, and might likewiſe have been reſtored in the ſame condition it was in when taken, the whole being removed with the cart.—But this law was found inconvenient to landlords, and too great an encouragement to tenants to withhold their rent; and therefore it is provided by *Stat.* 2 *W.* 3. *c.* 5. that it ſhall be lawful for any, having arrear of rent, to ſeize and ſecure any ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay lying in any barn or granary, or upon any hovel, ſtack or rick, or otherwiſe, upon any part of the land charged with ſuch rent, and to lock up or detain the ſame in the place where

1 Jones 197. Cooper *v.* Pollard. Ro. Abr. 666, 667. Sid. 440.

where it ſhall be found, in the nature of a diſtreſs, until the ſame ſhall be replevied, or ſold.

[And by the 11 *G.* 2. *c.* 19. § 8. The landlord may take and ſeize corn, graſs, hops, roots, fruits, pulſe, or other produce GROWING, as a diſtreſs; and the ſame may cut, gather, make, cure, carry, and lay up when ripe, in the barns or other proper place on the premiſes; and if there ſhall be no barn or proper place ON THE PREMISES, then in any other barn or proper place which he ſhall procure, SO NEAR AS MAY BE to the premiſes; the appraiſement whereof ſhall be taken when cut, gathered, cured, and made, and not before; provided that notice of the place where ſuch diſtreſs ſhall be lodged, ſhall, in one week after the lodging thereof, be given to the tenant, or left at the laſt place of his abode; and that if the tenant ſhall pay or tender the arrears of rent and coſts of the diſtreſs, before the corn, &c. ſhall be cut, the diſtreſs ſhall ceaſe, and the corn, &c. be delivered up.]

Co. Lit. 47. Dyer 312. 2 Inſt. 132. 565.

2*dly*. Tools and utenſils of a man's trade cannot be diſtrained while there is any other diſtreſs on the premiſes, or even then while they are in actual uſe; becauſe this would tend to the ruin of particular tenants, by taking away the very means of their ſupport and preſervation, and would conſequently be of public inconvenience; and therefore the ax of a carpenter, the books of a ſcholar, and the like, are not diſtrainable while any other

other diſtreſs can be had, " *or while they are in actual uſe.*"

" Thus in trover for three tape looms, where upon a caſe reſerved it appeared that the looms were diſtrained for rent, becauſe there was no other ſufficient diſtreſs upon the premiſes, the court of *B. R.* held the diſtreſs good, as it did not appear that the looms were in actual uſe at the time they were taken." Gorton v. Falkener, 4 Term Rep. 565.

" But where trover was brought for a ſtocking loom, which had been diſtrained for rent, and it appeared that an apprentice was uſing the loom at the time it was taken, the Court held that it could not legally be taken while the apprentice was uſing it." Simpſon v. Harcourt. M. 18 G. 2. cit. 4 Term Rep. 568.

But leſt this rule ſhould be carried ſo far as to privilege the ſheep of the tenant, and his beaſts of the plough (they being the materials of huſbandry, to plough and manure the land), and by that means the landlord be totally diſappointed of the rents,—this matter hath been ſettled by the *ſtat. de diſtrictione ſcaccarii*; which enacts that no man ſhall be diſtrained by the beaſts of his plough or his ſheep, either by the king or any other, while there is another ſufficient diſtreſs (*a*); 51 Hen 3. St. 4.

(*a*) In an action on this ſtatute it is not neceſſary to ſhew that there was a ſufficient diſtreſs, *præter*, &c. but it muſt come on the other part, viz. to plead that there was not a ſufficient diſtreſs *præter*, &c. Dyer 312. Sid. 348. It muſt be intended there was cattle ſufficient at the time of the diſtreſs, and it is not material what was before or after. 2 Inſt. 133. 2 Bac. Abr. 109.

unleſs

unleſs for damage feaſant, in which caſe the thing that does the treſpaſs muſt make compenſation.

3 Salk. 136. pl. 4.

[And the rule of the common law which exempts utenſils, tools, inſtruments of huſbandry, &c. from diſtreſs, hath been adjudged to hold only as to diſtreſſes for RENT, ARREAR, AMERCIAMENTS, &c.—and not in caſes where a diſtreſs is given in the nature of an execution, by any particular ſtatute; as for POORS RATES, &c. The ſame doctrine hath been extended to *averia carucæ*, by a ſubſequent caſe in which one of the queſtions was "whether *averia carucæ* may be taken as a "diſtreſs for the poors rates, where there "are other diſtrainable goods ſufficient." —As to this it was decided, that a ſeizure under the 43 of *Eliz.* and ſuch like acts of parliament, is but partly analogous to the common law diſtreſs, as being repleviſable, &c. but is much more analogous to the common law execution by *fieri facias*, where the ſurplus after ſale ſhall be returned. And though it was admitted that in the old common law diſtreſſes, which were in nature of a *nomine pœnæ* to compel payment, it would have been abſurd to ſuffer the implements, by which a man gained his livelihood, to be holden as a pledge, becauſe that would have been taking from him the only means he had of being able to diſcharge the debt; yet it was determined, that this reaſon does not hold where the things diſtrained may be

"Per Sand. Obſ. on St. 22 Car. 2. c. 1. p. 39. cit. Comyns tit. Diſtreſs letter C. Hutchins & Chambers, 1 Bur. 579."

be immediately ſold by way of ſatisfaction; which though called a diſtreſs, yet really is, in this reſpect, AN EXECUTION; and in caſes of execution, *averia carucæ* may be diſtrained, although there be other ſufficient diſtreſs. On this ground therefore, the court were unanimouſly of opinion, that there was no objection to the diſtreſs from the *averia carucæ* being taken: inaſmuch as they were diſtrainable under the 43 of *Eliz.* and ſuch like acts of parliament.]

"*3dly.* The general rule of law is "that "every thing upon the premiſes is liable to "the landlord's diſtreſs for rent whether "they are the effects of a tenant or a ſtran-"ger, becauſe of the lien the landlord has "on them in reſpect of the place where "the goods are found, and not in reſpect "of the perſon to whom they belong." 2 Term Rep. 601. But this rule has many exceptions in favor of trade to protect the goods of third perſons which happen to be upon the tenant's premiſes in the way of his trade; therefore things ſent to public places of trade, as cloth in a taylor's ſhop, yarn in a weaver's, a horſe in a ſmith's, and the like, are not diſtrainable; for it is of publick utility that the ſhops of traders ſhould be privileged from the lord's diſtreſs for his rent; for otherwiſe no man could ſupply himſelf with the neceſſaries of life, without the danger of loſing them for another's debt, and therefore the landlord cannot diſtrain theſe things for the rent of the ſhop. Co. Lit. 47. 3 Bur. 1502.

[But

Ld. Raym. 386.

[But it has been adjudged, that there is no ſuch reſtriction, where the diſtreſs is for a perſonal duty, as for toll.

Palmer 367, 374. Rex v. Collins, & others. 2 Rol. Rep. 345. S. C. 3 Bulſ. 269.

So the cattle and goods of a gueſt are not diſtrainable at an inn; for an inn is *publici juris*; and every man has a right to put up at it. Indeed it has formerly been queſtioned, whether a man could erect an inn at his own pleaſure: at leaſt, it appears that common inns are ſo much devoted to the public ſervice, that their owners are obliged to receive all gueſts and horſes that come to them for reception.]

" But the cattle or goods muſt be actually within the premiſes of the inn itſelf, to be exempted from diſtreſs, and not in any place the tenant may have removed them to, for his convenience; as where a race-horſe was diſtrained for rent at a ſtable half a mile diſtant from the inn, the ſtable being no part of the inn, the diſtreſs was determined to be a good one, and that the plaintiff had no remedy but againſt the innkeeper."

Croſier v. Thomlinſon, Barnes 472. H. 32 G. 2.

[And the privilege which exempts cattle and goods from being diſtrained at an inn ariſes from this circumſtance, that they are there by authority of law.]

Co. Lit. 47. a. Bro. Abr. tit. Diſtreſs, pl. 56. Rol. Abr. 668. pl. 12.

Bl. 484.

" This privilege, it ſeems, extends only to temporary gueſts, as a perſon who hires an unfurniſhed room in an inn, by ſuch hiring becomes an under-tenant, and any furniture he may have brought into ſuch room muſt be liable to the landlord's diſtreſs, he not being within the ſpirit of the privi-

privilege, which is allowed merely for public convenience."

[In a modern caſe, the queſtion was "whether a gentleman's chariot, which "ſtood in a coach-houſe belonging to "a common LIVERY STABLE keeper, was "diſtrainable for rent due to the landlord "from the livery ſtable keeper, for this "coach-houſe, which (together with the "ſtables, &c.) he rented of the landlord, "who diſtrained it." For the plaintiff, it was argued that the chariot was not diſtrainable, under a ſuppoſed analogy between a livery ſtable and a common public inn; and from the principle of general utility and convenience to the community. On the other hand, it was inſiſted for the defendant that a livery ſtable keeper differs widely from an inn-keeper; inaſmuch as the former is not liable to the ſame inconveniencies as the latter, and therefore ought not to enjoy the ſame privileges; and that if a livery ſtable keeper has no ſuch privilege himſelf, it muſt of courſe follow that none can be claimed under him. As to the principle of utility and convenience, it was urged, that there was no neceſſity for a gentleman to ſet up his chariot at a livery ſtable: and that the inconvenience would be much greater on the ſide of the landlord, if he ſhould be debarred of his legal right, to diſtrain goods found upon his premiſes, for rent in arrear, than any that could ariſe from allowing him this eſtabliſhed ſecurity for his rent in the caſe of a perſon who appears to be no more than an ordinary undertenant, and without any reaſonable pre- 3 Bur. 1498.

tence

tence of exemption from the general law of diſtreſſes. Lord *Mansfield* and the other judges preſent, ſaw this queſtion in ſuch a light, with regard to the conſequences of it, and the inconvenience that might attend it, even to the landlords, owners and keepers of livery ſtables, as well as to gentlemen who uſed them, (in caſe this diſtreſs ſhould be ſolemnly adjudged a good one,) that they intimated to the avowant, who happened to be perſonally preſent, that it might be well worth his while to conſider, whether it would be for his own intereſt to wiſh "that judgment ſhould "be formally pronounced FOR him." Accordingly, there was no judgment given. But (adds the reporter) it ſeems extremely clear, "that the chariot was liable to the di-"ſtreſs, and that there was not a ſhadow of "legal claim for an exemption."]

S. C. Bl. 435. "In a different report of this caſe it appears that the avowant did move for judgment three terms after, and that the Court gave judgment for him, upon the ground of its being part of the profits of the premiſes, and they ſaid that that circumſtance diſtinguiſhed it from the caſe of goods ſent to be manufactured."

Cro. Eliz. 549, 596. Read v. Burley. *J. S.* a clothier put wool to *B.* a ſpinner to ſpin, and afterwards *J. S.* comes with a horſe to bring back the yarn; but *B.* having no weights in his own houſe to weigh it, *J. S.* took his horſe and went with *B.* to the houſe of *C.* to get the yarn weighed; and *C.*'s landlord, while the yarn was weighing, came and diſtrained the yarn and the horſe

horſe of *J. S.* for *C.*'s rent. But the diſtreſs was held unlawful, becauſe if the yarn had been weighed either in *B.*'s houſe, or in a public weigh-houſe, it had been unqueſtionably privileged, for the encouragement of trade. So in this caſe the deſign of bringing the horſe and yarn into the houſe of *C.* being only in the way of trade, that deſign ſecures them from a diſtreſs in the houſe of *C.*—as much as if they were in a public weigh-houſe.——As a horſe that brings corn to a market, and is put into a private yard while the corn is ſelling, cannot be diſtrained; becauſe the bringing of the horſe there is in the way of trade, and conſequently public benefit.

"So goods put into the hands of a private perſon who undertakes to carry all perſons' goods indifferently are privileged whilſt in his poſſeſſion: thus in an action of trover, upon a ſpecial verdict the caſe was, that the plaintiff delivered his goods to *R.* who was not a common carrier, but who frequently brought things to *London*, and on his return took ſuch goods as he could get to carry back in his waggon into the country, for a reaſonable hire: when he arrived at home, he put his waggon, with the plantiff's goods therein into his barn where he left it two nights and a day, and then the landlord came and diſtrained the plantiff's goods which were in the waggon, for rent due for the houſe, which was a private houſe, and not an inn; and the Court held that this was the privilege of a common carrier, which protected goods in his poſſeſſion, as ſuch from diſtreſs, for the benefit

Giſbourn v. Hurſt, Salk. 249.

benefit of trade, and gave judgment for the plantiff."

10 H. 7. 21, b. Co. Lit. 47. b. Dr. & St. c. 7. p. 15. *contra.*

4thly. If a ſtranger's beaſts be upon the lord's land, by eſcape or otherwiſe, though they be not *levant* and *couchant*, the lord may diſtrain them, not only for rent, but for the accidental ſervices of heriots, amerciaments in leets, *&c.*

This rule was obſerved in the civil law, in the *prædiis urbanis*, but not in *prædiis ruſticis.*——But when the forfeiture of the feud, which originally accrued to the lord by not anſwering the ſervices, was changed into a diſtreſs, this was thought a mild alteration; and the diſtreſs was the rather extended by our law to ſtrangers' cattle for the recovery of the ſervices, to prevent any trick in the tenant, who might otherwiſe diſappoint the lord of his remedy, by grazing and ſtocking the land with other men's cattle. And if the ſtranger ſuffers, it is through his own default, in ſuffering his cattle to treſpaſs on another's ſoil.

2 Saund. 289.

And this rule hath been carried ſo far, that if a freeholder be bound to repair his neighbour's fences, and lets the land, and the leſſee ſuffers the fences to decay, whereby his neighbour's beaſts enter and come upon his lands, yet the freeholder may diſtrain theſe beaſts, thus eſcaped, for rent. But the Reporter obſerves, that this caſe is hard to be maintained; for though it be reaſonable that the lord of an ancient ſeignory, who is no way concerned in the fence, ſhould diſtrain beaſts thus eſcaping; yet it is not therefore juſt,

juſt, that a leſſor, who is obliged to ſee the fences kept, ſhould be ſuffered to take advantage of his own wrong.

[The ſame diſtinction was taken and admitted in a ſubſequent caſe. And it ſeems to be now ſettled, that where beaſts eſcape, and come upon land, by the negligence or default of their owner, and are treſpaſſers there, they may be diſtrained immediately by the landlord for rent arrear. But where they come upon the land, by the inſufficiency of fences, which the tenant, being a leſſee, ought to repair, the leſſor cannot diſtrain ſuch beaſts, till ACTUAL NOTICE has been given to the owner that they are there, and he has afterwards neglected to remove them. In the caſe of an ancient ſeignory however the lord may diſtrain the beaſts of a ſtranger, which have eſcaped by default of the tenant, in not repairing his fences; and that (as it ſhould ſeem) before they are *levant* and *couchant* (*a*), though the books differ in that

Ld. Raym. 168.

Lutw. 1580.

Ld. Raym. 169. Lutw. 1580. 2 Rol. Rep. 124.

(*a*) This doctrine has been objected to as too general; and ſeveral diſtinctions are taken, the ſum of which ſeems to be, that if a ſtranger's beaſts eſcape into another's land by default of the owner of the beaſts, as by breaking the fences, they may be diſtrained for rent immediately without being *levant* and *couchant*; but that if they eſcape there by default of the tenant of the land; as for want of his keeping a ſufficient fence, then they cannot be diſtrained for rent or ſervice of any kind till they have been *levant* and *couchant*, nor afterwards by a landlord for rent on a leaſe, unleſs on notice the owner of the beaſts neglects to remove them; tho' it is ſaid, that ſuch notice is not neceſſary where the diſtreſs is by the lord of the fee for an ancient rent, or by the grantee of a rent-charge. See this ſubject argued upon at large in the caſe of Kemp v. Crewes, 2 Lutw. 1573. Co. Litt. 47. b. Hargr. n. 3. 13th edit.

parti-

particular; becauſe the lord hath nothing to do with repairing the fences, and he hath no
Ld. Raym. 168. remedy but by diſtreſs. But the owner may prevent the diſtreſs, by making freſh purſuit; for then the cattle remain, as it were, in his own poſſeſſion (*a*).

Cro. Eliz. 549. If beaſts are turned in upon land by conſent of the owner, they are immediately diſtrainable for the landlord's rent;] and there-
Fowkes v. Joyce, 3 Lev. 260. 2 Ventr. 50. S. C. 2 Lutw. 1161. S. C. fore it hath been held, that where a ſtranger puts in his beaſts to graze for a night, by the conſent of the leſſor, and licence of the leſſee, yet the leſſor may diſtrain them for rent due out of thoſe lands which he conſented the beaſts ſhould graze on; becauſe the conſent for putting in the beaſts was not a waiver of his right to diſtrain, unleſs it had been expreſsly agreed ſo: for being but a parol agreement it could not alter the original contract between the leſſor and leſſee, from which the power of diſtraining ariſes.

But as in that caſe the beaſts were going to the *London* market, and only grazed one night on the land in their way thither, it was diſputed, whether their being on the road to market ſhould privilege them from the diſtreſs; and it was reſolved it ſhould NOT; becauſe then ſuch privilege muſt extend through the whole kingdom, which would lay too great a reſtraint on landlords; and the privilege of trade is local, and only relates to

(*a*) The lord cannot diſtrain beaſts which eſcape, when they are gone out of the land, tho' they are within view. Co. Litt. 47. b. 6 Hargr. n. 2.

the

the place where the market is kept; therefore the ſafeſt way is to drive cattle to a public inn, and then (as is ſaid before) they are privileged from diſtreſſes.

[However, in the foregoing caſe of *Fowkes* and *Joyce*, the owner of the cattle was afterwards relieved in equity, on the ground of fraud and contrivance in *Joyce*, the leſſor, to ſubject the cattle to his diſtreſs. And the Court of Chancery ſeemed to think that the grounds uſed with an inn, ought to have the ſame privilege, as the inn itſelf; and therefore that the cattle of ſtrangers or paſſengers, ought not to be there diſtrained. 2 *Vern.* 129. *Prec. Chan.* 7.

In a caſe alſo where a rent-charge had been in arrear for twenty years, and cattle, eſcaping out of the adjoining grounds, had been diſtrained for the arrears, the diſtreſs was relieved againſt in equity. *Broden* and *Pierce*, 2 *Vern.* 131.]

For a rent-charge the grantee cannot diſtrain a ſtranger's beaſts until they are *levant* and *couchant*. For this rent doth not ſtand upon a feudal title, as the rent-ſervice but it is ſaid to be againſt common right; and therefore the ſtranger's beaſts muſt be ſo long reſident on the lands, out of which the rent-charge iſſues, that notice may be preſumed to the owner of them; that is, they muſt be lying down and riſing up on the premiſſes FOR A NIGHT AND A DAY, without purſuit made by the owner of them. 2 Leon. 7, 8.

And

Bro. tit. Diſtr. pl. 40.

And it ſeems the ſheriff may diſtrain the beaſts of a ſtranger on my land, for the iſſues forfeited by me in the king's courts for non-appearance; for the iſſues forfeited by my default create a debt to the king, which is to be levied on my land;—and the obligation on me to appear on the ſummons in the king's courts, ariſes from my being proprietor of ſuch land, and I am ſummoned to appear, on the penalty of forfeiting ſo much of the iſſues of that land; which creates the obligation on me; and therefore whatever is found on that land ſhall be anſwerable for the iſſues forfeited by me.

Bro. tit. Diſtr. pl. 3.

5thly. Whatever is part of the freehold cannot be diſtrained, for what is part of the freehold cannot be ſevered from it without detriment to the thing itſelf in the removal; conſequently that cannot be a pledge which cannot be reſtored *in ſtatu quo* to the owner.

Co. Lit. 47. b.

Beſides, what is fixed to the freehold is part of the thing demiſed; and the nature of the diſtreſs is not to reſume part of the thing itſelf for the rent, but only the *inducta* and *illata* upon the ſoil or houſe. Hence it is that doors, windows, furnaces, *&c.* affixed to the freehold, are not diſtrainable.

4 Term Rep. 504. 567.

" This privilege ſeems to extend to ſuch things as the tenant will not be permitted on any conſideration to remove away with him from off the premiſſes on account of their being annexed to and conſidered as a part of the freehold, and not becauſe they are abſolutely affixed to it, and cannot be moved, as a tem-

a temporary removal of them for purpoſes of neceſſity is not ſufficient to deſtroy the privilege."

Thus a millſtone is not diſtrainable though it be removed out of its proper place in order to be picked; becauſe ſuch removal is OF NECESSITY, and the ſtone ſtill continues part of the mill. So it is of a ſmith's anvil on which he works; for this is accounted part of the forge, though it be not actually fixed by nails to the ſhop. Bro. tit. Diſtr. pl. 23.

6thly. What is in the hands and actual occupation of another cannot be diſtrained; for that cannot be a pledge to me which another has the actual uſe of; conſequently the diſtreſs, which follows the nature of a pledge, cannot be of thoſe things which cannot be reduced into the ACTUAL poſſeſſion of the perſon diſtraining; therefore the ax in a carpenter's hand, or the horſe on which I am riding, cannot be diſtrained; (for rent) for they are for that time privileged by law. Co. Lit. 47. a. Ro. Abr. 667. Sid. 440.

"So wearing apparel cannot be diſtrained whilſt on the perſon of the owner, but if taken off, tho' merely for the purpoſe of the owner's going to bed, and intended to be put on again in the morning, it may be diſtrained: Thus in treſpaſs for taking ſundry articles, where the defendant juſtified the ſeizing the goods as a diſtreſs for rent; and it appeared at the trial that part of the things taken was the wife's and childrens' clothes while they were in bed, which they had taken Biſſet v. Caldwell et al. Hil. 31 G. 3. N. P. B. R.

off the preceding evening, and meant to put on again when they got up, as they were in the daily habit of wearing them, where the defendant obtained a verdict upon the principle that they were not in *actual* uſe."

7*thly*. Goods in the cuſtody of the law are not diſtrainable; for it is *ex vi termini* repugnant, that it ſhould be lawful to take goods out of the cuſtody of the law.—And that cannot be a pledge to me which I cannot bring into my actual poſſeſſion. Hence it is that goods diſtrained for *damage feaſant* cannot be taken for rent; nor goods in a bailiff's hands on an execution; nor goods ſeized by proceſs at the ſuit of the king; nor will a replevin lie for them.

1 Ventr. 221. "Nor can goods be diſtrained which have been taken under an attachment, or ſold under a *fieri facias* under ſuch circumſtances, that it has not been proper ſince to remove them."

Southby v. Eaton, M. 3 G. 2. "Thus where a tenant's corn while growing was ſeized and ſold under a *fi. fa.* and the vendee permitted it to remain till it was ripe and then cut it, after which and before it was fit to be carried, the landlord diſtrained it for rent, and the court of *C. B.* and *B. R.* held it was not diſtrainable."

Parſlow v. Cripps, Com. 203. "But where corn was taken in execution and ſold by the ſheriff under 2 *W. & M. c.* 5. *ſ.* 3. and the vendee permitted it after ſeverance to lie on the ground, the Court held it was diſtrainable for rent."

"A land-

"A landlord having a legal right to diſtrain goods *while they remain on the premiſſes*, the iſſuing a commiſſion of bankrupt againſt the tenant, and the meſſenger's poſſeſſion of the goods of the renant, will not hinder him from diſtraining for rent, for it is not ſuch a *cuſtodia legis* as an execution is, and even there the law allows the landlord a year's rent. And the aſſignment by the commiſſioners of the bankrupt's eſtate and effects is only changing the property of the goods, and while upon the premiſſes they remain liable to be diſtrained." 1 Atk. 102. Cooke 213.

"Therefore upon a queſtion, Whether after a commiſſion of bankrupt taken out, and the meſſenger in poſſeſſion, the landlord ſhould diſtrain the goods upon the premiſſes, and ſo be ſatisfied his entire debt? or whether he ſhould come in *pro ratâ* with the reſt of the creditors under the commiſſion? it was decided that *the goods upon the premiſſes* might be diſtrained even after aſſignment, to ſatisfy the whole debt." Ex parte Plummer, 1 Atk. 103.

"So the goods of a bankrupt may be diſtrained in the hands of the aſſignees for duties in arrear to the crown, tho' the conviction does not take place till after the aſſignment."

"As where a candle-maker was in arrear for the ſingle duties for candles under 8 *Ann.* c. 9. and became bankrupt but was not convicted till after the aſſignment of his effects, the Court held that the double duties (being the penalty of that act) were a lien upon the candles, utenſils and materials in the hands Stracy v. Halſe, Dougl. 411.

of the aſſignees, and that the diſtreſs was good; tho' they ſeemed to think that the candles could not be diſtrained in the hands of third perſons who had bought them *bonâ fide*."

Ex parte Dillon, Cooke Bank. Laws, 214.

"But if the landlord neglects to diſtrain, and ſuffers the goods to be ſold by the aſſignees, he can only come in *pro ratâ* with the reſt of the creditors."

Ex parte Deſcharmes, 1 Atk. 103.

"Therefore where the landlord of the bankrupt preferred his petition to be paid by the aſſignees, the rent that was in arrear at the time the commiſſion was taken out, it appeared in evidence, that the whole eſtate and effects of the bankrupt were poſſeſſed by the aſſignees duly choſen under the commiſſion, and ſold by them ſeven years before the petition: The Lord Chancellor ſaid, the landlord's demand was too ſtale, and having loſt his remedy by diſtreſs, as no goods remained on the premiſſes he could only be conſidered as a common creditor and muſt come in *pro ratâ*."

Ex parte Grove, 1 Atk. 103.

"So where a commiſſion iſſued againſt *A.* who was a tenant of *B.*'s and owed him 12 years rent, *B.* the landlord comes in and proves his debt under the commiſſion, and the aſſignees ſold the whole goods to the petitioner, who lived in the tenant's houſe: The landlord three years after proving his debt diſtrained upon thoſe goods as being ſtill upon the premiſſes; but it was decided, that the vendee of the goods under the aſſignees was entitled to the goods, and the Lord

Lord Chancellor ordered that the proceedings of the landlord ſhould be reſtrained, and confined him to his remedy under the commiſſion."

"The principle that the landlord has no lien upon the goods after they are removed from the premiſſes, is ſtill more ſtrongly eſtabliſhed by the caſe of *Bradyll* v. *Ball*, which was thus:"

"*Bradbury* owing a year and a quarter's rent to the plaintiff's teſtator at *Midſummer*, 1780, he on the 28th of *June* in that year, cauſed a diſtreſs to be made on his goods for the ſame and the coſts. *Bradbury* replevied the goods, and entered into a replevin bond to the ſheriff with two ſureties, who have ſince become bankrupts. The cauſe in replevin was removed into the Common Pleas; but before any proceedings were had, *Bradbury* became a bankrupt, and the defendants *Jones* and *Ball* were choſen aſſignees, and poſſeſſed themſelves of the effects of *Bradbury* (and among them of the goods ſo diſtrained) and ſold them. After the bankruptcy the plaintiffs obtained judgment in this cauſe of replevin, and ſued out a writ *de retorno habendo*, and filed this bill, inſiſting that he had an equitable lien upon the goods taken in diſtreſs for a return of the goods, on payment of the value of them by the aſſignees. The Court ordered the bill to be retained, and an action at law to be brought for the money had and received to the plaintiff's uſe againſt the aſſignees, when the Court of King's Bench were unanimouſly of

Bradyll v Ball, 1 Bro. C. C. 427. Cooke's Bank. Laws, 218.

opinion that the plaintiff had no lien upon the goods."

Rex v. Cotton, Parker 112.

"In ſome caſes the diſtreſs itſelf is not protected from a ſubſequent proceſs; thus where the queſtion was, Whether goods were not liable to be ſeized on an immediate extent for the king's own debt, after a diſtreſs was taken of the ſame goods by a landlord for rent juſtly due to him, before an actual ſale of the goods, the Court of Exchequer determined that the extent took place of the landlord's claim for rent, upon the authority of a much ſtronger caſe which had been before determined in that court, in which the time for the ſale had expired, and an attachment had been moved for againſt the ſheriff for not having executed the writ of *venditioni exponas*."

Rex v. Dale, Parker 141.

3 H. 7. 1.

But if a replevin come after goods are ſold on the execution, the defendant muſt claim property, for then they are out of the cuſtody of the law in the hands of a private perſon.

Co. Lit. 47.

[And laſtly, as every thing which is diſtrained, is preſumed to be the property of the wrong-doer, it follows that ſuch things wherein no man can have an abſolute and valuable property, as dogs, cats, rabbits, and all animals *feræ naturæ*, cannot be diſtrained. Yet if deer, which are *feræ naturæ*, are kept in a PRIVATE incloſure for the purpoſe of SALE OR PROFIT, this ſo far changes their nature, by reducing them to a kind of ſtock or merchandize, that they may be diſtrained for rent.]

Davis v. Powell, C. B. Hil. 11 G. 2.

When we ſpeak of chattels not diſtrainable, it muſt be underſtood of chattels not diſtrainable FOR RENT; for all chattels whatever are diſtrainable *damage feaſant:* it being but natural juſtice that whatever doth the injury ſhould be a pledge to make compenſation for it.—Therefore all chattels are liable to make ſatisfaction for the treſpaſs by them committed; hence it is that the tools and utenſils of a man's trade, ſtacks of corn, and the horſe on which a man rides, are diſtrainable *damage feaſant*; nay the horſe may be led to the pound with the rider on him (*a*). Co. Lit. 47. Sid. 440.

[III. Of the time, place, and manner of making the diſtreſs.]

(*a*) Mr. *Hargrave* has the following note upon that paſſage of my Lord *Coke*'s —Some have thought that a horſe on which one is riding, may be diſtrained for damage feaſant. 2 Keb. 596. 1 Sid. 440. But the opinion was extra-judicial, and may be queſtioned; for 1 Ro. Abr. 664. A. pl. 4. and the caſe of 7 E. 3. Fitzh. Abr. Avowry 199, are directly contra. See alſo Cro Eliz. 549, 596. Some alſo have inclined to think, that horſes drawing a cart loaded with corn, tho' one is riding in the cart, may be diſtrained for rent, and for that purpoſe may be ſevered from the cart, if the perſon diſtraining does not chooſe to take the cart with the corn as well as the horſes, all of which, as it ſeems, are equally liable to the diſtreſs. See 2 Keb. 549, 596. 1 Vent. 36. and 1 Sid. 422, 440. in which latter book the Reporter makes a query, whether the man's being in the cart, ſhould not privilege the whole team. In the note following this, he adds "If ferrets and nets in a warren be damage feaſant, a diſtreſs on them is good." But if they are in the hands of a man, they cannot be diſtrained any more than a horſe on which a man is; nor can they be diſtrained, if they are out of the warren. See Vin. Abr. Diſtreſs, A. Co. Lit. 47. a. 13th edit. Hargr. n. 12, 13.

Dr. & St. 15. Co. Lit. 142. a. Mir. c. 2. ſ. 6.

1. A man cannot diſtrain for rent in the night [which, according to the author of the Mirror, is after ſun-ſet and before ſun-riſing]; becauſe the tenant hath not thereby notice to make a tender of his rent, which poſſibly he might do, to prevent the impounding of his cattle.

2 Inſt. 10. 7.

But a man may diſtrain in the night beaſts *damage feaſant*; becauſe the beaſts might eſcape before morning, or before he could take them; and then he would have no remedy for the injury.

2 Inſt. 107.

[The diſtreſs for rent, muſt be for rent in arrear; therefore it may not be made the ſame day on which the rent becomes due; for if the rent be paid at any time during that day, whilſt a man can ſee to count it, the payment is good] (*a*).

Co. Lit. 47. b. n. 6. 13th edit.

" But tho' in general, the landlord cannot diſtrain till the rent becomes due, if the agreement between him and his leſſee be otherwiſe, there is no objection to it in point of law: as if by the cuſtom of a particular country rent becomes due the inſtant the tenant begins to occupy, the landlord may diſtrain whatever goods are found upon the premiſſes before the year expires, except

(*a*) Strictly, the rent is demandable and payable before the time of ſun-ſet of the day whereon it is reſerved. 2 Bl. Com. 42. yet the rent is not due till the laſt minute of the natural day; for if the leſſor dies after ſun-ſet and before midnight, the rent ſhall go to the heir, and not to the executors. Hargr. Co. Litt. 202. a. n. 2.

thoſe

thoſe which are exempted from diſtreſs by ſome of the privileges before mentioned."

"Upon this ground the Court held, "that if a trader after committing an act of bankruptcy takes a ſhop and agrees to pay a year's rent in advance, where by the cuſtom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an aſſignment under the commiſſion, and before the year expired, might diſtrain the goods on the premiſſes for the half year's rent due upon his entrance; or if he bought the tenant's goods at the ſale under the commiſſion, that he might retain the amount of the half year's rent." Buckley v. Taylor, 2 Term Rep. 600.

[A diſtreſs muſt not be after tender of payment; for if the landlord come to diſtrain the goods of his tenant for rent, the tenant may, before the diſtreſs, tender the arrearages; and if the diſtreſs be afterwards taken, it is illegal. So if the landlord have diſtrained, and the tenant make a tender of the arrearages before the impounding of the diſtreſs, the landlord ought to deliver up the diſtreſs (*a*); and if he does not, the detainer is unlawful.]

"A diſtreſs may be made for rent accrued after the expiration of a notice to quit, but it Zouch v. Willingdale, 1 H. Bl. 311.

(*a*) See ſeveral authorities accordingly cited in the caſe of the Six Carpenters', 8 Co. 146. b. and 147. a. There Lord Coke ſtates the diverſities in point of effect, between tender on the land before diſtreſs, tender after diſtreſs and before incloſure, and tender after incloſure. See alſo Hob. 207. Co. Litt. 160. b. 13th edit. Hargr. n. 4.

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is a waiver of the notice, the taking of the diſtreſs being a proof of the landlord's intention and an expreſs confirmation of the tenancy."

[At common law, the landlord muſt have diſtrained for rent in arrear, during the continuance of the leaſe; but now by the ſtatute of 8 *Ann. c.* 14. § 6, 7, it is enacted, That it ſhall be lawful to diſtrain after the determination of the leaſe, in the ſame manner as if it had not been determined; provided that the diſtreſs be made within ſix calendar months after the determination of the leaſe, and during the continuance of the landlord's title or intereſt; and during the poſſeſſion of the tenant.]

" But where by the cuſtom of the country the off-going tenant is allowed any advantages reſpecting the premiſſes he has quitted; his right to theſe advantages are held to be ſuch a continuance of his intereſt and connexion, as will entitle the landlord to diſtrain for rent in arrear after ſix months have expired after the determination of his leaſe."

Lewis v. Harris, Summer Aſſiz. at Hereford, cor. Ch. Baron Skinner, 1778. cit. 1 H. Bl. 7. n.

" Thus in an action of trover for a quantity of wheat, where the defendant juſtified under a diſtreſs for rent: the diſtreſs was made in *March*, the term having ended the *Candlemas* twelvemonth before; but it was during the time the wheat was in the barn, part of the demiſed premiſſes, and alſo during the time allowed by the cuſtom of the country to the off-going tenant to get in and diſpoſe of his off-going crop, it was determined that the tenant's

tenant's cuſtomary right to theſe advantages was a continuance of his intereſt in that part of the lands to which it extended, and that therefore the landlord was entitled to diſtrain the wheat upon the premiſſes, tho' more than ſix months after the term had expired in the reſt of the farm, and accordingly the plaintiff was non-ſuited."

"And in a much later caſe where the ſame point was reſerved for the opinion of the Court of *C. B.* the Court after taking time to conſider, were unanimouſly of opinion, that where a cuſtom authorized a tenant to depoſit his away-going crops, when reaped, in the barns and out-houſes of the demiſed premiſſes, and to threſh them and keep them there for a certain time after the leaſe had expired, although the tenant had quitted the premiſſes the landlord might diſtrain the corn ſo left, for rent arrear, after ſix months had expired from the determination of the term, upon the ſame ground, *viz.* that the intereſt and connexion between the landlord and tenant continued by the operation of ſuch cuſtomary right." Beavan v. Delahay, 1 H. Bl. 5.

"In another caſe upon this ſtat. 14 *Ann. ſ.* 6, 7, it was reſolved, "That if a tenant dies and his repreſentative enters upon the premiſſes and continues therein until the end of the term, and afterwards, the landlord may at any time within the ſix months after the end of the term under the reſtrictions preſcribed by this act diſtrain for the arrears which were due at the time the original tenant Braithwaite v. Cookſey, 1 H. Bl. 465.

nant died, as well as for what accrued afterwards."

2 Inſt. 131. Mir. c. 2. ſ. 6.

2. No private perſon can diſtrain beaſts off his own land, or on the high road;—ſo is the ſtatute of *Marlbridge*, *c.* 15. *Nulli liceat ex quâcunque cauſâ diſtrictiones facere extra feodum ſuum, nec in regiâ viâ, aut communi ſtratâ*, (*a*) *niſi domino regi*, *&c.* for the high road is privileged for the convenience and encouragement of commerce.

[Yet this ſhall not be taken to make the diſtreſs illegal, ſo as to give an advantage thereof in bar of the avowry—but to this purpoſe only, that if the lord diſtrain in the highway, the tenant may have an action againſt him upon this ſtatute. 2 *Inſt.* 131.—As to the king's power of diſtreſs on any lands of the tenant, though not holden of the king, the reader may conſult 5 *Co.* 4, 56. 1 *Rol. Abr.* 670. 2 *Rol. Abr.* 159. 2 *Inſt.* 132. 4 *Inſt.* 119. *Lane* 39.]

And though chattels or pledges on the land only, are to anſwer the lord's rent; yet if the lord comes to diſtrain, and the tenant ſeeing him drives the cattle off the land, the lord may follow the beaſts and diſtrain out of his fee, if he had once a view of his cattle on his land. But if the beaſts go off the land of themſelves before the lord obſerve them,

(*a*) Some diſtreſſes alſo by the ſubject are not within this proviſion, of which there are inſtances given with the reaſons in 2 Inſt. 133. and Lord Hale's Notes on F. N. B. 90. A. Co. Litt. 160. a. 13th edit. Hargr. n. 1.

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he cannot diſtrain them afterwards, as he might where the tenant drives them off: for the tenant by his own wrong cannot prevent the lord of his right.

[In treſpaſs for taking goods, the defendant juſtified, that he demiſed ſome tenements to the plaintiff for one term, and others for another term; and that rent being in arrear on both demiſes, he diſtrained the goods. On demurrer the diſtreſs was held ill; for theſe being ſeparate demiſes, there ought to have been ſeparate diſtreſſes, on the ſeveral premiſſes ſubject to the diſtinct rents: and no diſtreſs on one part can be good for both rents. For theſe reaſons, therefore, the plaintiff had judgment. *Str.* 1040.

But where lands, lying in different counties, are held under one demiſe, at one intire rent; in ſuch caſe, a diſtreſs may be lawfully taken in either county, for the whole rent in arrear. *Ld. Raym.* 55.

And now, (by 11 *G.* 2. *c.* 19.) if any tenant for life, years, at will, ſufferance, or otherwiſe, ſhall fraudulently, or clandeſtinely convey his goods off the premiſſes, to prevent his landlord from diſtraining the ſame; ſuch perſon, or any perſon by him lawfully empowered, may in thirty days next, after ſuch conveyance, ſeize the ſame, wherever they ſhall be found, and diſpoſe of them in ſuch manner as if they had been diſtrained on the premiſſes.—But (by § 2. of the ſame ſtatute) the landlord ſhall not diſtrain any goods, which ſhall have been previouſly ſold, *bonâ fide*,

fide, and for a valuable conſideration, to any perſon not privy to ſuch fraud.

And by the ſame ſtatute, (§ 3.) every tenant who ſhall ſo convey away his goods, and every perſon who ſhall knowingly aid or aſſiſt him therein, or in concealing the ſame, ſhall forfeit to the landlord double the value of ſuch goods.

By the ſame ſtatute, the landlord may diſtrain any cattle or ſtock of the tenant, depaſturing on any common belonging to the demiſed premiſſes.

3. At common law, no perſon was allowed to break open or throw down any gates or incloſures, to make a diſtreſs; for that would have amounted to a diſſeiſin. *Co. Lit.* 161. And the leſſor could not, in any caſe, have entered into the houſe, nor even into the barn of his tenant, for the purpoſe of making a diſtreſs, unleſs the outer door had been open. *Bac. Abr.* 2 v. *p.* 111. But when he was in the houſe, it was held that he might break open an inner door. *Comb.* 17. So he might have taken the diſtreſs out at a window. *Bac. Abr. ib.*

Caſ. Temp. Hardwicke 168.

And now by ſtatute, (11 *G.* 2. *c.* 19. § 7.) where any goods or chattels, fraudulently or clandeſtinely conveyed off the premiſſes, to prevent the landlord from diſtraining them for rent, ſhall be put, placed or kept in any houſe, barn, ſtable, out-houſe, yard, cloſe, or place, locked up, faſtened, or otherwiſe ſecured; it ſhall be lawful for the landlord, his

his ſteward, bailiff, receiver, or other perſon or perſons impowered for that purpoſe, to take and ſeize, as a diſtreſs for rent ſuch goods and chattels, (firſt calling to his aſſiſtance the conſtable, headborough, borſholder or other peace officer of the hundred, diſtrict or place, where the ſame ſhall be ſuſpected to be concealed; and in caſe of a dwelling houſe, oath being alſo firſt made before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein), in the day-time, to break open and enter into ſuch houſe, barn, ſtable, out-houſe, yard, cloſe and place; and to take and ſeize ſuch goods and chattels for the arrears of rent, as he might have done if they had been in any open place.

If a landlord comes into a houſe and ſeizes upon ſome goods as a diſtreſs in the name of all the goods in the houſe, it is a good ſeizure of the whole. 6 *Mod.* 215.]

Diſtreſſes ought not to be exceſſive; but in proportion to the duty diſtrained for.—This is provided by the ſtatute of *Marlbridge*, *c.* 4. *Diſtrictiones inſuper ſint rationabiles & non nimium graves; & qui diſtrictiones fecerint irrationibiles graviter amercientur.*

52 H. 3. c. 4.
2 Inſt. 106, 107.

Thus if the lord diſtrain two or three oxen for 12 *d.*—this is unreaſonable; ſo if he diſtrain a horſe or an ox for a ſmall ſum, where a ſheep or a ſwine may be had, this is an exceſſive diſtreſs, becauſe he might have taken a beaſt of leſs value.—But if there be no other diſtreſs on the land, then the taking of one entire

2 Inſt. 107.
Ro. Abr. 674.

entire thing, though of never ſo great value, is not unreaſonable.

4 Co. 8. 66. Ro. Abr. 674. Bro. Abr. tit. Aſſiſe 291. Prerogative 98.

No diſtreſs for *homage*, *fealty*, or for the expences of knights in parliament can be exceſſive (*a*), becauſe theſe are ſervices of ſuch abſolute neceſſity to the publick, that men cannot be under too great an obligation to perform them.

9 Vin. Abr. 173.

"And as theſe diſtreſſes cannot be ſold, the owner upon making ſatisfaction, may have his chattels again."

[Before the ſtatute of the 17 *Car.* 2. *c.* 7. (*b*) in caſe a diſtreſs was too little, where ſufficient diſtreſs was to be had, a man could not diſtrain again, were the demand ever ſo great; becauſe it was his folly that he did not diſtrain ſufficient in the firſt inſtance. *Moore* 7. *Comb.* 546.

But now, by that ſtatute, in all caſes where the value of the cattle diſtrained ſhall not be found to be to the full value of the arrears diſtrained for; the party to whom ſuch arrears were due, his executors or adminiſtrators may diſtrain again for the reſidue of the arrears.

So where the diſtreſs is made by virtue of the warrant of a juſtice of the peace, in na-

(*a*) But qu. and vide 42 E. 3. 26. 4 Co. 8. b. Bevil's caſe, 2 Inſt. 107. where it is ſaid that the ſtatute of Marlbridge is general. 2 Bac. Abr. 115. in marg.

(*b*) Extended into Wales and the Counties Palatine, by 19 Car. 2. c. 5.

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ture of an execution. As, in the caſe of *Hutchins* and *Chambers*, where one of the queſtions was, "whether a ſecond diſtreſs "could be at all juſtified, when there was "enough, which might have been taken "upon the firſt, if the diſtrainer had then "thought proper."

It was reſolved, that a man who has an entire duty ſhall not ſplit the entire ſum, and diſtrain for one part of it at one time, and for other part of it at another time; and ſo *toties quoties*, for ſeveral times: for that is great oppreſſion.

And ſo is the caſe of *Wallis* v. *Savill* in 2 *Lutw.* 1532. Where the ſecond diſtreſs was holden unjuſtifiable; becauſe both diſtreſſes were taken for one and the SAME rent, and it was the leſſor's folly, that he had not taken a ſufficient diſtreſs at firſt.]

"Neither ſhall a perſon diſtrain as for an entire ſum where there are ſeveral amerciaments due for diſtinct offences, as each amerciament ought to be levied ſeparately." Clarke v. Lucas, B. R. M. 2 G. 2.

[But if a man SEIZES for the whole ſum that is due to him, and only MISTAKES the value of the goods ſeized; which may be of very uncertain, or even imaginary value, as pictures, jewels, race-horſes, *&c.* there is no reaſon why he ſhould not afterwards complete his execution by making a further ſeizure. And how can the officer who ſeizes judge of the real or perhaps imaginary, value of the horſes or goods ſeized?

The value of them may be quite unknown to him, or may even depend upon whim and fancy.

It is to the advantage of the owner of the goods that this ſhould be ſo. It is better for him that the officer ſhould be at liberty to ſeize a ſecond time, in caſe he makes an inſufficient ſeizure the firſt time: or elſe it might induce him to a neceſſity of taking effects of a very great value, at firſt. For if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at the firſt.

Now pictures, horſes, jewels, books, and ſome other ſuch effects, may be of ſo uncertain, and even imaginary, or fancied value, that it may be exceedingly uncertain how much money they may fetch when they come to be ſold: ſo that the perſon ſeizing may not be at all able to judge, HOW MUCH they may produce upon ſale.

And if he does not take the value of the whole at firſt, out of tenderneſs and moderation, perhaps, there is no reaſon why he ſhould not complete it by a ſecond ſeizure; provided it be for the ſame ſum due. 3 *Bur.* 589.—The latter part of this reaſoning ſhould ſeem to extend only to a SEIZURE under an execution.

Another queſtion in the caſe of *Hutchins* and *Chambers* was,—"Whether the SECOND diſtreſs, being EXCESSIVE, was a ſufficient ground for an action of TRESPASS."—

Several

Several authorities were cited to ſhew that an action of treſpaſs will not lie for taking an EXCESSIVE diſtreſs; but that it ought to be a particular action grounded upon the ſtatute; and particularly one caſe in 2 *Stra.* 851. *Lynne* v. *Moody*, in which it was ſaid that the remedy ought to be a ſpecial action, founded on the ſtatute of *Marlbridge*.

So that it was ſufficiently eſtabliſhed that a general action of treſpaſs cannot be maintained for taking an exceſſive diſtreſs.

One caſe was cited to the contrary, which was the caſe of *Moir* v. *Munday*, *H.* 28 *G.* 2. *B. R.* and that was an action of treſpaſs; where ſix ounces of gold, and one hundred ounces of ſilver, were taken for 6 *s.* 8 *d.* which was holden to be an EXCESSIVE diſtreſs, and there judgment was given for the plaintiff.

But that appeared upon the face of it, and upon the pleadings to be exceſſive; and ſo the Court expreſsly declared. And it was a diſtreſs of gold and ſilver, which are of a certain known value, and even the meaſure of the value of other things. But it was there holden, "that in all OTHER "caſes of goods or OTHER things of arbi- "trary and uncertain value, it MUST be an "action upon the ſtatute." And this was the diſtinction there taken. And that is therefore an exception, and was there conſidered as being ſo from the general rule; and ſerves to confirm the rule itſelf. The Court were therefore of opinion, that there was no cauſe of action maintainable in the

preſent caſe, it being an action of TRESPASS. 1 *Bur.* 590.]

1 Mod. 71. "Neither is a man liable to a criminal proſecution for taking an exceſſive diſtreſs."

Phillips v. Barriman, Tr. 23 G. 3. "There can be no remedy upon the ſtatute of *Marlbridge*, where there is a remedy at the common law; nor if the plaintiff has recovered in replevin, can he afterwards bring an action on that ſtatute, for an action on that ſtatute is founded on there being a cauſe of diſtreſs, of which the recovery in replevin ſhews there was none; moreover, in replevin damages were recoverable for the taking, and a man ſhall not be permitted to ſay there was a cauſe of diſtreſs, after he has recovered, upon the ground of its being unlawful."

[But if any diſtreſs and ſale be made, as for rent in arrear and due, when in truth not any is due, in ſuch caſe the owner may recover double the value, with full coſts. 2 *W. ſeſſ.* 1. *c.* 5. *ſ.* 5.

And if the diſtreſs be made without cauſe, the owner may make *reſcous*; yet, if in ſuch caſe it be impounded, the owner cannot break the pound and retake it, becauſe, then it is in the cuſtody of the law. 1 *Inſt.* 47.]

Ro. Abr. 674. At common law, no man was obliged to give notice of his having taken a diſtreſs; becauſe the tenant muſt have known the arrears that were due; and therefore at his peril muſt have taken care to pay them;—

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It was his own default that ſubjected the land to the lord's diſtreſs. Beſides the law has appointed a publick pound for keeping the diſtreſs, where the tenant by reſorting may have notice.

[But *quære*, whether notice muſt not be given of dead chattels, which muſt be kept in a private pound?

It ſeems that, at common law, where the diſtreſs was impounded in a common pound overt, the owner muſt have taken notice of it at his peril; but if it were impounded in a ſpecial pound overt, ſo conſtituted for that particular purpoſe; or in a pound covert; the diſtrainor muſt have given notice of it to the owner. But the common law, as to giving notice in caſes of diſtreſs for rent, is now altered by a ſtatute which will be mentioned hereafter.]

IV. How the diſtreſs is to be uſed, [and diſpoſed of.]

Firſt, we ſhall conſider where the diſtreſs, which is but a pledge, is to be kept;—and that is in the pound.—This is deſcribed by *Spelman* in theſe words.—*Parcus eſt ſtabulum, vel area anguſtior repagulis firmiter concluſa, quâ nociva in frugibus prædiiſq; pecora tanquam in carcere coercentur.*—*Parci autem uſum a continente traduxiſſe Saxones noſtros hinc intelligas, quod in ripuariorum legibus jam olim utpote ante 800 vel 900 annos reperitur. Si quis peculium alienum, in meſſe adprehenſum, ad parcum minare non permiſerit, 15 ſol culpabilis judicetur.* Spelm. 447. Tit. 82. f. 2. Gall. mener.

Co. Lit. 47. b. The pound then being nothing more than a publick priſon for goods and chattels, is either *overt* or *covert*. All living chattels diſtrained, are regularly to be put in the pound *overt*, becauſe the owner at his peril is to ſuſtain them, and therefore they ought to be put in ſuch an open place as that he may have reſort to them for that purpoſe.

2 Inſt. 106. At common law a man might have impounded his diſtreſs in what county he pleaſed; but this was found very inconvenient to the owner, who was thereby at a loſs where to find his beaſts, either to feed or replevy them. This miſchief was therefore provided againſt by the ſtatute of *Marlbridge*, *c.* 4. "*nullus de cætero faciat* "*ducere diſtrictiones quas fecerit, extra comi-* "*tatum in quo captæ fuerint.*"

Ibid. Yet upon this ſtatute it hath been held, that where the tenancy is in one county and the manor in another, the lord may drive the diſtreſs to the manor pound though it be out of the county where the diſtreſs was taken;—becauſe the tenant by attending the manor court is preſumed to know every thing tranſacted in the manor; and therefore this caſe is out of the miſchief provided againſt by that law.

But now by the ſtatute of 1 & 2 *Ph.* & *M.* *c.* 12. no diſtreſs of cattle is to be driven out of the hundred, &*c.* where the ſame is taken, except it be to a pound *overt* within the ſame ſhire, not above three miles from the place where the ſame is taken;

taken; nor impounded in ſeveral places, whereby the owner may be conſtrained to ſue ſeveral replevins; on pain to forfeit to the party aggrieved, 100 ſhillings and treble damages.

"In an action on this ſtatute the plaintiff cannot recover coſts, becauſe the ſtatute does not mention coſts, and no damages were recoverable in ſuch a caſe at common law." 2 Inſt. 289. Dyer 177. Tidd on Coſts 4. See Cro. Car. 560. 1 Roll. Abr. 574.

"The offence created by this ſtatute for impounding a diſtreſs in a wrong place, is but a ſingle offence, and ſhall be ſatisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be ſevered ſo as to make each offender ſeparately liable to the penalty, the meaning of the ſtatute being that the penalty ſhall be referred to the offence, not to the perſons." Cowp. 612.

"Thus where three perſons diſtrained a flock of ſheep, and ſeverally impounded them in three ſeveral pounds, whereby, *&c.* it was held that they ſhould forfeit but one five pounds, and one treble damages." Cro. Eliz. 480. Gould 145. Moor 453. 1 Salk. 182.

"But *Fenner* J. ſaid in *Noy* 62. S. C. if the plaintiff brings his action againſt them ſeverally, every one ſhall pay 5 *l.*"

[The defendant juſtified impounding cattle *damage feaſant*; and in evidence it appeared that he put them into the next pound, though it happened to be in another county. And *Lee* Ch. J. held that it did not 2 Str. 1272. 1 Lev. 48.

not make him a treſpaſſer, though it ſubjected him to the penalty in the ſtatute of 1 & 2 *Ph. & M. c.* 12.

Ld. Raym. 55. And in another caſe, where lands, lying in two adjoining counties, were held under one demiſe, at one entire rent, and the landlord diſtrained cattle in both counties for rent arrear, it was holden that he might chaſe them all into one county; though if the counties had not adjoined, it would have been otherwiſe.

By the ſame ſtatute (§ 2.) no perſon ſhall take for keeping in pound, or impounding any diſtreſs, above four-pence for any one whole diſtreſs: and where leſs hath been uſed, there to take leſs; on pain of forfeiting 5 *l.* to the party grieved, beſides what he ſhould take above four-pence.]

Badkin v. Powel, Cowp. 476. "Treſpaſs will not lie againſt the pound-keeper merely for receiving the diſtreſs, though the original taking be tortious, he being bound to take and keep whatever is brought to him, at the peril of the perſon who brings it; as if wrongfully taken, they who take it are anſwerable, and not the pound-keeper unleſs he exceeds his duty, and aſſents to the treſpaſs. Nor can the pound-keeper maintain any action for a pound-breach, for he is not conſidered as having any intereſt in the ſubject impounded."

Co. Litt. 47. b. Ro. Abr. 673. Dead chattels, as houſehold goods, *&c.* which may receive damage by the weather, muſt be put into a pound *covert*; otherwiſe the diſtrainer is anſwerable for them if they

be damaged, or ſtolen away; and this pound *covert* muſt be within three miles, in the ſame county.

But beaſts, as is ſaid, ought to be put in a publick pound; for if they be placed in a private pound, the diſtrainer muſt keep them at his peril with proviſion, for which he ſhall have no ſatisfaction; and if they die for want of ſuſtenance, the diſtrainer ſhall anſwer for them.

[Now by 11 *G.* 2. *c.* 19. § 10. any perſon diſtraining, may impound, or otherwiſe ſecure the diſtreſs, of what kind ſoever it be, in ſuch place, or on ſuch part of the premiſſes, as ſhall be moſt convenient; and may appraiſe and ſell the ſame, as any perſon before might have done off the premiſſes.]

But the diſtrainer cannot work or uſe the thing diſtrained, whether it lie in a pound *overt* or *covert*; becauſe the diſtrainer has only the cuſtody of the thing as a pledge, and therefore is not to make uſe of it; but the owner may make profit of it at his pleaſure. 2 Bac. Abr. 112.

[But there is an exception to this general rule in the caſe of milch kine, which may be milked by the diſtrainer; becauſe it may be neceſſary to their preſervation, and conſequently of benefit to the owner.] (*a*) Bagſhaw v. Goward. Cro. Jac. 148.

The

(*a*) After an accurate inveſtigation of all the caſes upon this ſubject, the *dictum* in the caſe above cited is the only one which appears in favour of this point, and in different reports of that caſe, there are *dicta* to the contrary;

Ld. Raym. 720. S. C. 1 Salk. 428. 27 Aſſiſ. 64.

The diſtrainer cannot tie or bind a beaſt in the pound, though it be to prevent its eſcape; for BEASTS IN POUND ARE IN CUSTODY OF THE LAW, which intends the preſervation of the pledge; and therefore the diſtrainer at his peril muſt do no act that tends to the hurt or deſtruction of them.

Ld. Raym. 720. Salk. 248. S. C. Doct. & Stud. c. 27.

[But if cattle diſtrained die in the pound, without any fault in the diſtrainer; in ſuch caſe, he who made the diſtreſs ſhall have an action of treſpaſs; or may diſtrain again, if the diſtreſs was for rent.]

contrary; in ſupport of which ſeveral other authorities are ſelected and thrown together in the following note:

In Rolle's Abr. 673. l. 32. and in 9 Vin. Abr. pl. 8. it is ſaid, "If a man takes a *cow* for a diſtreſs, *he cannot milk her*, for though the cow be the better for it, yet he ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage by this, came to the cow, and if it periſh by this, yet he that took the diſtreſs may diſtrain again, and ſo he is at no damage." The ſame caſe is in Noy 119. and the ſame point is there *reſolved*, and in *Prideaux*'s caſe cited in Noy, the reaſon given is "becauſe it is a puniſhment to the owner, and *in cuſtodiâ legis*." So in Chamberlayn's caſe 1 Leon. 220, the Court of Common Pleas, Anderſon Ch. J. *diſſentiente*, held, that *cows* diſtrained *could not be milked*, but they ought to be put in a pound overt, *and the owner might milk them* and fodder them. So in Owen 124. "He who diſtrains cannot *make uſe* of the diſtreſs, for he has no property therein, but a *a bare power by act of law to take it*. The ſame point is in Bl. Com. 13. and the ſame caſe cited from Cro. Jac. as above.

Cows taken for a diſtreſs are in a very different ſituation in regard to the perſon taking them, than where they are taken in *Withernam*, or as *Eſtrays*, in both which caſes *they may be milked*; in the former, becauſe they are delivered to the party in lieu of his own cattle, and in the latter, becauſe he that takes them is bound, ſo long as he keeps them, to find them in proviſions, and preſerve them from damage. 1 Roll. Abr. 889. 1 Leon. 220.

If

If a diſtreſs be taken without cauſe, a ſtranger cannot reſcue them from being driven to pound; but the owner may make reſcue BEFORE THEY ARE IMPOUNDED. But after the beaſts are impounded, the owner himſelf cannot reſcue them, unleſs he finds the pound unlocked, for he cannot break it open. The reaſon is, that the naked poſſeſſion is a title againſt any perſon but the owner; but the owner has a title, and therefore may take the beaſts at any time, though he cannot break the pound which the law hath ordained (*a*). Ld. Raym. 105. 3 Bl. Com. 12. Co. Litt. 47. b.

[By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth againſt the peace, and doth a treſpaſs to the king, and to the lord of the fee, and to the ſheriffs, and hundredors, in breach of the peace, and to the party, and in delay of juſtice; and therefore hue and cry is to be levied againſt him as againſt thoſe who break the peace. And the party who diſtrained may take the goods again, whereſoever he ſhall find them, and impound them again. Mir. c. 2. ſ. 26. Co. Litt. 47. b.

And now by ſtatute, on any pound breach, or reſcous of goods diſtrained for rent, the perſon grieved thereby ſhall, in a ſpecial ac- 2 W. & M. c. 5. ſ. 4.

(*a*) But if a man diſtrain cattle for *damage feaſant*, and put them in the pound, and the owner that had common there make freſh ſuit, and find the door unlocked, he may juſtify the taking away of the cattle in a *parco fracto*. Co. Litt. 47. b.

Vide 30 E. 26. Where the defendant pleads, that he found the cattle *ſans nul manuer de fermure ne ferrure n'autre engine*. Hale, MSS. Co. Litt. 47. b. Harg. n. 5.

tion

tion (*a*) UPON THE CASE, recover treble damages and coſts againſt the offender, or againſt the owner of the goods, if they be afterwards found to have come to his uſe or poſſeſſion.]

Lawſon v. Story, Ld. Raym. 19.

"It has been adjudged in an action on 2 *W. & M. c.* 5. that the word "treble" ſhall be referred as well to the word "coſts," as to the word "damages," and conſequently that the coſts ſhall be trebled as well as the damages."

Co. Litt. 257. b. Dyer 159. b. pl. 38. Cowp. 368. 1 Term Rep. 72.

"And it is determined, in general, that where a ſtatute gives treble damage, the coſts ſhall be trebled of courſe."

[When a man hath taken a diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is A RESCOUS in law.

Co. Litt. 161.

2. Diſtreſſes for rent being in the nature of pledges, the diſtrainer had no power to ſell them, at the common law. But now by ſtatute (2 *W. & M. ſeſſ.* 1. *c.* 5.) it is enacted, that where any goods ſhall be diſtrained for rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant or owner of the goods diſtrained, ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion houſe, or other moſt

(*a*) In ſuch action the plaintiff need not ſhew his right to diſtrain. Cotſworth v. Betiſon, Ld. Raym. 104. S. C. Salk. 247.

notorious

notorious place on the premiſſes, replevy the ſame; in ſuch caſe the perſon diſtraining ſhall, with the ſheriff or under-ſheriff of the county, or with the conſtable of the hundred, pariſh or place, where ſuch diſtreſs ſhall be taken, cauſe the goods ſo diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch ſheriff, under-ſheriff or conſtable ſhall ſwear to appraiſe the ſame truly, according to the beſt of their underſtandings); and AFTER ſuch APPRAISEMENT, ſhall SELL the ſame for the beſt price that can be gotten for them, for ſatisfaction of the rent, and charges of the diſtreſs, appraiſement and ſale; leaving the overplus (if any) with the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.]

"In the notice for the ſale of a diſtreſs under this ſtatute it is not neceſſary to ſet forth at what time the rent became due for which the diſtreſs has been made." Moſs v. Gallimore, Doug. 279.

"If the perſon diſtraining is ſworn one of the appraiſers, it is illegal, for he is intereſted in the buſineſs; and the ſtatute ſays that *he* with the ſheriff, *&c.* ſhall cauſe the goods to be appraiſed by two ſworn appraiſers." Andrews v. Ruſſel, et al. Bull. N. P. 84. 5th edit.

[In an action of treſpaſs, for entering the plaintiff's houſe, and keeping poſſeſſion of it for eight days, the defendant juſtified under a diſtreſs for rent. But by the Court, the defendant ought to have removed the goods at the five days end: and for the other three he is a treſpaſſer, and there is no juſtification. Str. 717.

But *quære*, as to the time of removing the diſtreſs; for the tenant is to have five days

to

to make replevin; and as thoſe muſt be whole days, excluſive of the day of taking the diſtreſs, it follows that the diſtrainer cannot remove the diſtreſs till the ſeventh day.]

Wallace v. King, 1 H. Bl. 13.

"But in an action on the caſe for ſelling goods diſtrained for rent in arrear, before five days had expired next after the diſtreſs was taken, and notice given, the Court ſeem to have held that as ſoon as five days (allowing twenty-four hours to each day, and computing the beginning of each from the moment when the notice was given) had expired, the diſtreſs might be removed and ſold."

Ibid.

"Thus where a diſtreſs was made and a regular notice of ſale given in the (*a*) morning of the 12th day of *May*, and in the afternoon of the 17th, the goods were removed and ſold, it was held that on the evening of the 17th five days *from the time* of the diſtreſs had completely expired, and that the removal and ſale was regular according to the time allowed by the ſtatute."

Ld. Raym. 54.

[In an action of trover brought for cattle which had been diſtrained for rent, it was found that the plaintiff was owner of the cattle, and that the defendant, after taking the diſtreſs, gave notice to the plaintiff, according to the ſtatute of 2 *W. & M. ſeſſ.* 1. *c.* 5. And it was objected that the notice was ill;

(*a*) It does not appear from the report at what time on the 12th the diſtreſs was taken, and the notice given, but from the reaſon given by the court, why the removal and ſale were regular, which was that five days *from the time* of the diſtreſs had completely expired on the afternoon of the 17th, that muſt have been the caſe.

for

for the act ſays, that it ſhould be at the chief manſion-houſe, or other notorious place upon the premiſſes; but in this caſe, it was given to the plaintiff himſelf. *Sed non allocatur*; for by the Court, the intent of the act was only that the party ſhould have notice, which is performed by this mean, better than if it had been left at the houſe or other place. It was alſo objected to the notice, that, according to the finding of the jury, it was given to the owner of the cattle, and not to the tenant of the land. And that although the act is in the disjunctive yet it ought to have a reaſonable, conſtruction; and it is moſt reaſonable, that the notice ſhould be given to the tenant of the land, becauſe he may ſhew that the rent is ſatisfied, which does not lie in the knowledge of the owner of the cattle. *Sed non allocatur*; for the act has expreſsly provided, that notice may be given to the owner of the goods. But if the tenant had ſued a replevin, then the notice muſt have been given to him; but notice to the owner ſufficiently affects the owner; and the plaintiff is found owner of the cattle, therefore notice to him is ſufficient.

In the ſame caſe it appeared, that the tenement, whereupon the diſtreſs was made, lay part in the hundred of *Kinaſley* in *Wiltſhire*, and part in the hundred of *Andover* in the county of *Southampton*; that part of the diſtreſs was taken in *Kinaſley*, and part in *Andover*; but that all was impounded together in the hundred of *Kinaſley*; and that the conſtable of *Kinaſley* adminiſtered the oath to the appraiſers for the whole in the preſence of the conſtable of *Andover*. It was objected,

that the goods which were taken in *Andover*, ought to have been appraiſed and ſold there, and that the conſtable of *Andover*, though preſent in *Kinaſley* when the appraiſement was made, had no juriſdiction there; ſo that the whole was done ſolely by the conſtable of *Kinaſley*, which therefore, as to the goods taken in *Andover*, was void. But by the court, as the diſtreſs was taken for ONE ENTIRE rent, the diſtrainer might well impound the whole of it in *Kinaſley*; and the chaſing of the cattle, taken in *Andover*, to the pound in *Kinaſley*, was but a continuance of the taking: therefore the conſtable of *Kinaſley* was the proper officer, within the act, to ſuperintend and adminiſter the oath for the appraiſement of the whole diſtreſs.

R. acc. 2 Wilſ. 354. 3 Wilſ. 295. D. acc. Lutw. 60.

As to the mode of ſelling a diſtreſs under warrant from a juſtice of the peace; it is enacted, by the 27 *G.* 2. *c.* 20. that the juſtice granting the warrant of diſtreſs, ſhall therein order and direct, that the goods diſtrained ſhall be ſold, within a certain limited time, not being leſs than four, nor more than eight days; unleſs the penalty or ſum of money diſtrained for, with the reaſonable charges of the diſtreſs, be ſooner paid. And after ſuch ſale, the overplus, (if any) is to be returned on demand to the owner of the goods diſtrained.]

1 Barnard. K. B. 110. Str. 1184.

"The goods or cattle diſtrained under this act are not repleviſable, and an attachment will be granted againſt the ſheriff for ſuffering the goods to be replevied, as he has no power to examine the proceedings of the juſtices."

"But

"But in caſes where the juſtices have only a ſpecial juriſdiction, if they exceed that, it was held that the goods diſtrained under their warrant might be replevied." Bl. 1331.

"The power of aſcertaining the charges of the diſtreſs and ſale is not given to the juſtices under 27 *G.* 2. *c.* 20. as it is ſometimes in ſtatutes which give the ſame authority, therefore it ſeems, that the officer executing the warrant is the ſole judge thereof in the firſt inſtance, ſo that if the owner of the goods is diſſatisfied, the reaſonableneſs of his charge muſt be determined by an action." 1 Burn. Juſt. 554.

"A juſtice of the peace alſo is in general impowered by the ſame ſtatute which creates any penalty, fine, or forfeiture, to grant a warrant of diſtreſs to levy the ſame; and as it frequently happened that the goods and chattels of the perſons againſt whom the warrant of diſtreſs was granted by the juſtice of the peace were out of the juriſdiction of the juſtice granting it, by which reaſon the warrant was ineffectual; it is enacted by 33 *G.* 3. *c.* 55. *ſ.* 3. "That in all caſes where any penalty, forfeiture, fine or other money may by the warrant of any juſtice or juſtices of the peace be directed to be levied by diſtreſs and ſale of the goods and chattels of any perſon or perſons, if ſufficient diſtreſs cannot be found within the limits of the juriſdiction of the juſtice granting ſuch warrant of diſtreſs, on oath thereof made by one witneſs, before any juſtice of the peace of any other county, riding, diviſion, city, borough, town corporate

or place, (which oath ſhall be by him certified by indorſement on ſuch warrant) ſuch penalty, forfeiture, fine, or other money, or ſo much thereof as may not have been before levied or paid, ſhall and may by virtue of ſuch warrant and indorſement be raiſed and levied by the perſon or perſons to whom ſuch warrant of diſtreſs ſhall have been originally directed, by diſtreſs and ſale of the goods and chattels of ſuch perſon or perſons, in ſuch other county, riding, diviſion, city, borough, town corporate, or place, and the money ariſing by ſuch diſtreſs and ſale ſhall be applied and diſpoſed of for ſuch purpoſes, and in like manner, as if ſufficient goods and chattels, or ſuch perſon or perſons had been found within the juriſdiction of the magiſtrate originally granting ſuch warrant; and if no ſuch diſtreſs can be found, ſuch offender or offenders ſhall and may be forthwith proceeded againſt according to law; provided always, that no juſtice who ſhall indorſe any certificate upon, or authorize the execution of any ſuch warrant of diſtreſs which may not have been granted within his juriſdiction, ſhall be anſwerable or accountable for any irregularity which may have been committed or done in or about the obtaining or granting of ſuch warrant of diſtreſs."

[At common law, the many particulars which attended the taking of a diſtreſs, rendered it a hazardous mode of proceeding; for, if any one irregularity was committed, it vitiated the whole diſtreſs, and made the diſtrainer a treſpaſſer *ab initio*. But now it is provided,

provided, by ſtatute, that where any diſtreſs ſhall be made for any kind of rent JUSTLY due, and any irregularity ſhall be afterwards done by the party diſtraining or his agent; the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer AB INITIO; but the party grieved may recover ſatisfaction for the ſpecial damage in an action of treſpaſs or on the caſe at his election. But no tenant ſhall recover in ſuch action, if tender of amends hath been made before the action brought. And the defendant in ſuch action may plead the general iſſue, and give the ſpecial matter in evidence.] 11 G. 2. c. 19. ſ. 19. Ib. ſ. 20. Ib. ſ. 21.

"A landlord cannot juſtify, under the plea of the general iſſue given by this act except for acts done as landlord; and therefore although he may juſtify as far as the *diſtreſs* goes, he cannot juſtify expulſion under this iſſue: So alſo if the goods continue on the premiſſes beyond the five days, he cannot juſtify under this iſſue, entering the houſe to remove them afterwards; but muſt plead a licence to juſtify the *aſportavit*, or *liberum tenementum* to juſtify the expulſion." Biſſet v. Caldwell, at Niſi Prius, H. 31 Geo. 3.

"An action of trover will not lie for goods ſold before five days have expired next after the diſtreſs and notice, that not being a remedy which can be purſued ſince 11 *G.* 2. *c.* 19. as it tends to place the landlord in the ſame ſituation as he was before the paſſing of that act, the action ought to be brought ſpecially for the particular irregularity." Wallace v. King, 1 H. Bl. 13.

[But though the tenant ſhall only make ſatisfaction for the real damage ſuſtained, by 2 W. & M. ſeſſ. 1. c. 5. ſ. 5.

any irregularity in taking or diſpoſing of the diſtreſs; yet if any diſtreſs and ſale ſhall be made, for rent pretended to be due to the perſon diſtraining, where in truth no ſuch rent is due, the tenant ſhall recover, double the value of the goods diſtrained, together with full coſts of ſuit.]

CHAP. II.

OF THE

REPLEVINS.

HAVING in the foregoing chapter ſhewn in what caſes a diſtreſs or pledge may be taken, and how it is to be diſpoſed of; the next thing, in order, to be treated of is, THE REMEDY given the party to controvert the legality of ſuch caption, in order to bring back the pledge to the proprietor, in caſe the diſtreſs were unlawfully taken, and without juſt cauſe. This being a writ of great uſe, and of every day's practice, deſerves a very full conſideration.

Spelman in his *Gloſſary* deſcribes it thus: *replegiare eſt rem apud alium detentam, cautione legitimâ interpoſitâ, redimere—et hæc cautio eſt ſtipulatio in formâ juris adhibita, de ſtando juri et ſiſtendo ſe foro; dictum autem* replegiare *quaſi* revadiare, *hoc eſt vadium vel pignus unum, loco alterius, ſuggerere & conſtituere.* Spel. Gloſſ. 485.

Or, in other words, a repleven is a juſticial writ to the ſheriff, complaining of an unjuſt taking and detention of goods or chattels; commanding the ſheriff to deliver back

the ſame to the owner, upon ſecurity given to make out the injuſtice of ſuch taking, or elſe to return the goods and chattels.

Under this head are to be conſidered;

I. How the replevin ſtood at common law, and the alterations which have been made therein by ſtatutes.

II. Of the duty of the ſheriff in the execution of the replevin; and herein of the pledges.

III. Of the proceſs to make the defendant appear.

IV. Of the proceſs where the goods are eloigned; and herein of the writ of *withernam*.

V. Of the proceſs and proceeding where the defendant claims property.

VI. Of the proceſs, as well for the plaintiff as defendant, in removing the replevin from the inferior courts.

VII. Of the replevin itſelf; and herein are to be conſidered,

1. For whom and in what caſes it lies.

2. The declaration in replevin.

3. The ſeveral pleas in this action.

4. The

4. The judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and the writ of ſecond deliverance.

VIII. Of the writ of recaption.

1. Of the replevin as it ſtood at common law. Here it is firſt to be obſerved, that the replevin was at common law a juſticial writ, that is, gave the ſheriff a juſticial power to determine the point complained of in the county, whereas other writs gave him only a miniſterial power. This juſticial power is taken from theſe words in the writ: *Et eum juſte deduci facias*—by which the ſheriff is made judge, whether the taking be juſt or not. This was highly reaſonable, in order that this remedy might be ſpeedy, leſt the party ſhould want his beaſts for carrying on of his huſbandry; and therefore not to have formed this writ juſticial, would have been not only detrimental to private perſons, but injurious to the common-wealth. Hence it is called *feſtinum remedium*. Beſides, it would have been of great trouble and expence to private perſons to have taken the determination of theſe ſort of complaints, which muſt have happened every day, out of the neighbourhood. And yet the manor court was not truſted with this power in any cauſe between lord and tenant, becauſe the lord was not to be judge in his own cauſe. 2 Inſt. 140. Reg. 81. a

2*dly*. It is to be obſerved that there are two things complained of in this writ, *viz*. The taking and detention of the pledges, as the Dr. & Stud. c. 27. 2 Inſt. 107. 5 Co. 76. a. 8 Co. 146. b.

Cro. Eliz. 813. 1 Brownl. 173.

words of the writ expreſs it—*quæ cepit & injuſte detinet.*—But what is principally controverted in the replevin, is, whether the taking be juſt or not. For there are but two caſes wherein a diſtreſs juſtly taken, whether for rent or *damage feaſant*, can be unlawfully detained. The firſt is where the arrear of rent, or amends for the damage, is tendered to the party diſtraining.—And this tender muſt be made before the beaſts are impounded (*a*); for when the beaſts are in cuſtody of the law, the perſon diſtraining cannot be ſaid unlawfully to detain that which is in the cuſtody and care of the law.

Hence it is, that if a tender be made after impounding, and the beaſts die in pound, the owner ſhall bear the loſs; becauſe ſuch tender comes too late to fix any fault or injuſtice on the perſon diſtraining. But if the tender had been before the impounding, it ſeems the diſtrainer is anſwerable, becauſe the impounding is unlawful.

5 Co. 76. a. Cro. Eliz. 813. Rol. Rep. 258.

But here it is to be obſerved, that the tender of amends muſt be pleaded to the lord himſelf, and not to the bailiff, who makes conuſance of the cauſe of the caption and detention in right of the lord; for that right is not barred by a tender to any other than the lord himſelf.—But if a tender be pleaded to the lord, and they give in evidence a tender to the lord's bailiff, where the lord was preſent, that won't maintain the plea; becauſe

(*a*) And if divers beaſts are diſtrained, and any one of them be impounded before a tender is made, the tender is void. Lutw. 1262. 5 Bac. Abr. 8.

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the derivative power of the bailiff ceaſes where the lord is preſent; and they ought to prove the tender to that proper perſon to whom the amends belong, and who was ready to receive it. Yet if they plead a tender to the lord, and prove a diſtreſs taken by a bailiff, the lord not being preſent, and prove the bailiff to be the uſual receiver of the lord; *qu.* if that will not be a proof of ſufficient tender of amends to the lord himſelf?

The ſecond caſe where the detainer is unlawful, is where the avowant hath return irrepleviſable, and the owner of the beaſts tenders all that appears to be due on the judgment in the avowry; the detainer of the avowant is unlawful, and the owner may have his action of detinue for the detainer after the tender made. For though by the judgment the return is made irrepleviſable, yet that is no final condemnation of the beaſts or goods diſtrained; they are ſtill to be conſidered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption upon payment or ſatisfaction of that rent or damages, for which they were originally taken.—Lord *Coke* aſſigns another remedy for the owner to recover his beaſts, and that is upon ſatisfaction made in court to have a writ for their delivery. 2 Inſt. 107, 341. 2 Inſt. 107.

Qu. The form of this writ.

The detention then being complained of in this writ, it may not be improper to look into the ancient method of trying ſuch unlawful

ful detention, and what remedy the owner of the beaſt has for it at this day. The ancient method of trying the legality of the detention was very inconvenient, for the plaintiff in replevin was to have his ſuitors ready to prove *inſtanter*, that he had offered a pledge, under the notion that the pledge was ſufficient; the lord was then put to his law-wager, that the pledge offered was not ſufficient to anſwer the debt, ſo that it was totally thrown upon his conſcience to determine the ſufficiency of the pledge. This method of trial was anciently practiſed and allowed, becauſe originally the lord might have ſeized the land for non-performance of the ſervices, and therefore, when the rigour of that law was mitigated, by turning the forfeiture into a diſtreſs, it could not be thought any unreaſonable indulgence to the lord, to make him judge of the ſufficiency of the pledge which was to be put into his hands while the ſuit depended; becauſe in all events the lord ought to be ſafe.

This account of trying the legality of the detention is given by *Bracton* in the following words:

Bract. 156. Fleta 94.

Si autem defenderit detentionem injuſtam, & querens ſectam habeat ſtatim ad manum, quæ examinata in omnibus concors fuit, & quod omnia facta fuerint ſub eorum præſentia, tunc vadiabit defendens legem ſe duodecima manu; in qua ſi defecerit, incidet in manum vicecomitis & reſtituet querenti damna ſua quæ habuit per illam detentionem; ſi autem legem fecerit dominus, tunc quietus recedet, & querens in miſericordiâ,

ricordiâ, ſed nulla damna recuperabit, & returnabit domino averia capta. The lord recovered no damages where he prevailed on the law-wager, becauſe he had no damage where the tender proved inſufficient. But if the lord prevailed not on the law-wager, the plaintiff in replevin had HIS damages, becauſe he really was injured by the lord's refuſal, in loſing the uſe of his beaſts or goods, which he had a right to, upon the ſufficient tender.

But the legality of the detention depending entirely on the ſufficiency of the tender, a more equal and better method of trial was found out by the conſcience of twelve diſintereſted men; no way concerned in the event of the trial. And the point comes in iſſue in the following caſe. Where the lord impounds the beaſts notwithſtanding the ſufficient tender of the tenant, the tenant hath no way to recover his cattle but by his writ of replevin; for if he takes them out of the pound himſelf, he is liable to an action for breaking the pound:—this puts the lord to his avowry, wherein he muſt ſhew the cauſe of his taking and detention; to which the plaintiff in replevin pleads, that after the taking, and before the impounding, he made a ſufficient tender; and thereupon it ſhall be tried by a jury whether the tender was ſufficient, and if it be found ſo, the plaintiff in replevin ſhall have damages for ſuch unlawful detention.

Dr. & Stud. c. 27. Cro. El. 813. F. N. B. 69. G.

But though by the common law this writ was made juſticial for the eaſe of the ſubject,

ject, and the more ſpeedy adminiſtration of juſtice, yet the ſubject, both lord and tenant, was expoſed to many difficulties and inconveniencies in the progreſs of the ſuit, which were afterwards removed by ſeveral ſtatutes. For,

2 Inſt. 139. 5 Mod. 253.

1*ſt*. The replevin at common law was only by writ, and this application muſt have been to the chancery, which was too tedious for the diſtant parts of the kingdom.

52. H. 3.

To make this remedy therefore more expeditious, it is provided by the ſtatute of *Marlbridge*, *c.* 21. *Quod ſi averia alicujus capiantur, & injuſte detineantur, vicecomes poſt querimoniam inde ſibi factam, ea ſine impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare poſſit.*—By force of this ſtatute the ſheriff may hold plea in replevin BY PLAINT of any value, as he might at common law on a writ of replevin; the writ of replevin being A JUSTICIES or commiſſion for that purpoſe.

2 Inſt. 139.

F. N. B. 69. E. Co. Lit. 145. 2 Inſt. 139. 16 H. 7. 14.

And to take away all the delays which attended the replevin by writ, the ſheriff, by this act, may, upon complaint made, command his bailiff, either by word or precept, to replevy the plaintiff's beaſts; for poſſibly the ſheriff cannot write, which was frequently the caſe in thoſe days, or has not the materials of writing with him; and this the ſheriff may do out of his county court. For this act being made for the more ſpeedy adminiſtration of juſtice, hath received the moſt favourable conſtruction.

Bro. tit. Replevin, pl. 46.

ſtruction. It would be very inconvenient that the owner of the beaſts, for whoſe benefit the act was made, ſhould ſtay till the next county court, which is held only from month to month. But then the ſheriff muſt enter the plaint at the next court, that it may appear on the rolls of the court.

"The hundred court cannot replevy by plaint out of court, (*a*) though there be a preſcription for it; for it derives its authority from the county court, and that could replevy by writ only, before the ſtatute of *Marlbridge* which does not extend to the hundred court." Hallet v. Birt. Ld. Raym. 219.

"But now for the more ſpeedy delivery of cattle taken by way of diſtreſs, it is enacted by 1 & 2 *P.* & *M. c.* 12. *ſ.* 3. that every ſheriff of ſhires, being no cities or towns made ſhires, ſhall at his firſt county day, or within two months next after he hath received his patent of office of ſheriffwick, depute, appoint, and proclaim in the ſhire town within his bailiwick, four deputies at the leaſt, dwelling not above twelve miles one diſtant from another: which ſaid deputies ſo appointed and proclaimed, ſhall have authority in the ſheriff's name to make replevies and deliverance of ſuch diſtreſſes, in ſuch manner and form as the ſheriff may and ought to do; upon pain that every ſheriff for every month that he ſhall lack ſuch deputy or deputies, ſhall forfeit for every ſuch of-

(*a*) But the different reports do not agree as to the opinion of the court upon the point. See extracts from each, 19 Vin. 20. under pl. 8. Ld. Raym. 219. 4th Edit. n.

fence,

ſence, five pounds: the one half of which forfeitures ſhall be to the king, the other half to him that will ſue for the ſame."

Trevannian's Caſe, 11 Mod. 32.

"And if a perſon who has no authority grants replevins, the court of *K. B.* will grant a *quo warranto* information againſt him. Thus where an attorney uſurped an authority of granting replevins, and replevied his own goods, though the court at firſt refuſed an information, becauſe the diſtrainer had another remedy by *parco fracto*, yet they afterwards made a rule *niſi*."

2*dly*. Another miſchief at common law was, that the replevin being juſticial, and determinable in the county court, if the plaintiff in replevin pleaded to the lord's avowry that the tenancy was *hors de ſon fee*, the inferior court had no farther conuſance of the action; becauſe this plea brought THE FREEHOLD in queſtion, which the county court, not being a court of record, had no power to try, and therefore could not proceed. By ſuch means the lord was left without remedy to recover the beaſts as his pledges; becauſe the court could not determine the point on which the return was to be made. This was remedied by *Weſtm.* 2. *c.* 2. which gave the lord a *pone* to remove the cauſe into the king's courts, where that plea might be tried, and the lord be eſtabliſhed in the poſſeſſion of his ſervices, and ſtill have the pledges *de retorno habendo* retained for him.

13 Ed. 1.

A third

A third miſchief at common law was, that when the avowant had judgment for a return of the beaſts, he had very often no benefit by his ſuit; becauſe it frequently happened that, pending the ſuit, the tenant had ſold the cattle delivered to him on the replevin, and become inſolvent. The miſchief aroſe from this, that the ſheriff could only take from the plaintiff *plegii de proſequendo* in this, as in other actions; which pledges were only to anſwer the amerciament to the king *pro falſo clamore*, and looked no further: and even theſe being very ſmall did ſoon degenerate into mere matter of form. To remedy this inconvenience, the ſaid ſtatute of *Weſtm.* 2. *c.* 2. hath directed the ſheriff, *non ſolummodo recipere plegios de proſequendo a conquerentibus, ſed etiam de averiis retornandis, ſi adjudicetur retornand'; & ſi quis alio modo plegios ceperit, reſpondeat ipſe de pretio averior'.*— But the method of proceeding in this caſe will be fully treated of under the writ *de retorno habendo.* 13 Ed. 1.

4*thly.* Another miſchief was, that if the plaintiff had nonſuited himſelf, and the avowant had judgment, yet he could not have a return irrepleviſable; but the tenant might replevy the ſame diſtreſs *in infinitum.* This alſo is remedied by the ſame ſtatute of *Weſtm.* 2. *c.* 2. by which it is provided *quod quam cito adjudicatum fuerit retornum averiorum diſtringenti; per breve de judicio, mandetur vicecomiti, quod retornum habere faciat diſtringenti de averiis, in quo brevi inſeratur, quod vicecomes ea non deli-* 2 Inſt. 340. 13 Ed. 1.

deliberet ſine brevi, in quo fiat mentio, de judicio per judic' reddit'; quod fieri non poterit niſi per breve quod exeat de rotulis juſtic', coram quibus deducta fuerit loquela. Purſuant to this law, the writ *de retorno habendo* concludes thus, after a recital of the judgment for the avowant,—" *ideo tibi præcipimus quod præd'* (the avowant) *averia præd' ſine dilatione retornari facias, & ea ad querimoniam ipſius* (the plaintiff in replevin) *non deliberes ſine brevi noſtro, quod de præfat' judicio expreſſam faciat mentionem.*"

Reg. Jud. 4. a.

Therefore we command you, that the aforeſaid (the avowant) the beaſts aforeſaid without delay you return, and that you do not deliver them upon the complaint of (the plaintiff in replevin) without our writ, which ſhould expreſsly mention the aforeſaid judgment.

This writ, which muſt recite the former judgment, is the writ of ſecond deliverance, which will be treated of in its proper place.—Only here it may be neceſſary to obſerve, that if the avowant hath judgment in the ſecond deliverance, he ſhall have return irrepleviſable of the beaſts; but ſubject ſtill to redemption by the tenant on payment of the rent; becauſe they are ſtill in the nature of a gage or pledge. The ſeveral other alterations that have been made in the replevin will be taken notice of under the ſubſequent heads.

2 Inſt. 341.

II. Of the duty of the ſheriff in the execution of the replevin; and herein of the pledges.

Whether the replevin be by plaint or writ, the ſheriff, before he grants the one, or executes the other, ought to take from the plaintiff pledges *de proſ'* and pledges *de retorno habendo*. The firſt, as has been ſaid, was at common law, to anſwer the amerciaments to the king *pro falſo clamore*, in caſe the plaintiff did not prevail in the ſuit. The other pledges were introduced by *Weſtm.* 2. *c.* 2. for the ſecurity of the avowant, in caſe he ſhould have judgment for return of the beaſts.—And by this act theſe pledges are anſwerable to the avowant, if the plaintiff hath diſpoſed of the beaſts pending the ſuit. And if the pledges are inſufficient, the ſheriff is made anſwerable by that ſtatute for their inſufficiency.

Dalt. Sher. 277. 439. Cro. Car. 446. 3 Mod. 57. Comb. 1. S. C. Skin. 244. S. C.

And it ſeems the pledges *pro retorno habendo*, may be by bond even of the plaintiff in replevin himſelf. The condition of which is, not only that the plaintiff ſhall proſecute the ſuit in replevin, but alſo that he will make return of the beaſts, if return thereof be adjudged by law, and alſo to ſave harmleſs and indemnify the ſheriff for delivery of the ſaid beaſts: for the ſheriff being anſwerable for the ſufficiency of the pledges, may take the ſecurity as he pleaſes, ſince it is at his own peril.

Dalt. Sher. 440. Offic. Brev. 222. Ld. Raym. 278.

Theſe pledges are in the nature of ſureties *pro retorno habendo*, and therefore money or any other cattle being a pawn, is not a pledge within this ſtatute; for the proceſs, as ſhall be hereafter ſhewn, is by *ſcire facias*, which is a proceſs to bring the pledge or

Cro. Car. 446. 1 Jones 378. Dalt. Sher. 434.

ſurety into court to ſhew cauſe, and therefore cattle cannot be a proper pledge. For this reaſon, a ſheriff has been adjudged to be liable to an action on the caſe for taking money, as a pledge *de retorno habendo*; becauſe the money was not ſuch a pledge as the ſtatute directs. And it ſeems there need not NECESSARILY be more pledges than one, if that be ſufficient; though the words of the act are *pledges* in the plural number: becauſe if one pledge be ſufficient, the defendant hath no loſs, and therefore the intention of the ſtatute is anſwered, which provides for the defendant's ſafety.

[Now, for the greater ſecurity of perſons diſtraining FOR RENT, it is provided by ſtatute (11 *G.* 2. *c.* 19. § 23.) that ſheriffs and other officers, having authority to grant replevins, ſhall in every replevin of a diſtreſs FOR RENT take in their own names, from the plaintiff and two ſureties, a bond in double the value of the goods diſtrained (ſuch value to be aſcertained by the oath of one or more witneſſes not intereſted, which oath the perſon granting ſuch replevin is to adminiſter) and conditioned for proſecuting the ſuit with effect and without delay, and for returning the goods in caſe a return ſhall be awarded, before any deliverance be made of the diſtreſs; and ſuch ſheriff or officer taking ſuch bond, ſhall at the requeſt and coſts of the avowant, or perſon making conuſance, aſſign ſuch bond to the avowant, *&c.* by indorſing the ſame, and atteſting it under his hand and ſeal in the preſence of two or more witneſſes, which may be done without any

ſtamp;

ſtamp; provided the aſſignment be ſtamped before any action brought thereon; and if the bond be forfeited, the avowant, *&c.* may bring an action thereupon in his own name, and the Court may by rule give ſuch relief to the parties upon ſuch bond, as may be agreeable to juſtice; and ſuch rule ſhall have the effect of a defeaſance.]

The ſheriff having thus taken pledges from the plaintiff in replevin, he ought forthwith to make deliverance of the goods or cattle diſtrained; but if the diſtreſs was taken within a liberty and impounded there, the ſheriff ought firſt to iſſue his warrant to the bailiff of the liberty, having return of writs, to make deliverance. And if the bailiff makes no anſwer, or as the ſtatute of *Marlbridge* ſays, *c.* 21.—*Ea deliberare noluerit, tunc vicecomes pro defectu ipſius ballivi ea faciat deliberari.*—This act, as to this part of it, was made to enlarge the power of the ſheriff, by impowering him to enter into the liberty to make delivery, where the bailiff was negligent. Whereas at common law the ſheriff could not enter into the liberty without a *non omittas*, which was too dilatory. 2 Inſt. 139, 140. F. N. B. 68. F.

And by this act, if a diſtreſs was taken out of a liberty and impounded within it, the ſheriff might enter the liberty without any previous warrant to the bailiff; becauſe the caption, which is one of the points complained of in the replevin, was in the county, and out of the liberty; and therefore the right to make a deliverance, ought to be in that 2 Inſt. 140.

officer, within whoſe diſtrict or juriſdiction the cauſe of complaint firſt aroſe. And all this is law, whether the replevin be by plaint or by writ.

If the diſtreſs be drawn into a houſe, caſtle, or other ſtrong hold, the ſheriff or his bailiff, after demand made for deliverance of the diſtreſs, may break open the houſe or caſtle to replevy them.—This ſeems to be the common law;—for though a man's houſe is privileged by common law for himſelf, his family, and his own goods, ſo that the ſheriff cannot break it open to attach any of them in a civil action at the ſuit of a private perſon;—yet a man's houſe could not privilege or protect the goods of ANOTHER perſon unjuſtly taken, ſo as to prevent the officer to make replevin; becauſe the privilege and ſecurity of a man's houſe could protect but his own goods.—This practice however, of driving diſtreſſes into ſtrong holds, was ſo frequent in the barons' wars, and the poorer ſort ſuffered ſo much from the men of power, that the ſtatute of *Weſtm.* 1. *c.* 17. expreſsly gives this power to the ſheriff, or his officer, to break the houſe to make delivery of the cattle, whether the replevin be by plaint or by writ.—But this, as is ſaid, muſt be after demand made, and notice given to the lord to ſuffer them to be replevied. And, to deter the perſon diſtraining from refuſing or neglecting to deliver the diſtreſs, the ſtatute further directs, that the caſtle, or ſtrong hold, ſhall be razed and thrown down; but this muſt be on a ſuit in behalf of the king, wherein all parties concerned in intereſt muſt firſt

2 Inſt. 193.

Dalt. Sher. 438, 439.

2 Inſt. 194.

firſt be heard. And by this act, if the bailiff of a liberty, having return of writs, ſhall not make deliverance for the reaſon aforeſaid, the ſheriff may proceed without delay, or any new authority, to make replevin in manner aforementioned. Though in other actions, even in executions, at the ſuit of private perſons, he cannot enter a liberty, without a *non omittas*.

If the replevin be executed, and the deliverance made, where it is by plaint, the bailiff, at the time he makes deliverance, ought alſo to attach the defendant by his goods, to make him appear at the next court day; for in this action the attachment is the firſt proceſs; becauſe the replevin complains of a tortious taking, which is in nature of a treſpaſs. Dalt. Sher. 438, 439.

Where the replevin is by writ, and the ſheriff executes it before the *alias* or *pluries* comes to his hands, the ſheriff may hold plea of it in his county court; but either party may remove it by *pone* or *recordari* into the courts above; the plaintiff without cauſe, and the defendant upon cauſe ſhewn. F. N. B. 70. Dalt. Sher. 440.

This writ of *pone*, if it be taken out by the plaintiff in replevin, hath a clauſe in it, to ſummon the defendant to appear in the court above, at the return of the writ; *quod tunc ſit ibidem præfato* A. (the plaintiff) *inde reſponſurus*; and ſo *vice verſa*. If the replevin be removed by the defendant, then the *pone* commands the ſheriff, "*quod dicat præfato* A. (the plaintiff) *quod ſit ibi loquelam ſuam*

verſus prædictum B. (the defendant) *inde proſecuturus, ſi voluerit, &c.*—"To tell the aforeſaid *A.* (the plaintiff) to be there to proſecute his plaint thereof againſt the aforeſaid *B.* (the defendant) if he ſhall think proper." And by this means both parties have days in the court above.

F. N. B. 68. E. If the ſheriff doth nothing upon the firſt writ, the plaintiff may have an *alias*, and after that a *pluries* replevin. In the *pluries* is always inſerted this clauſe, "*vel cauſam nobis certifices, quare mandatum noſtrum, alias tibi inde directum, exequi noluiſti vel non potuiſti.*"—"Or certify your reaſon to us why you would not, or could not execute our commands heretofore to you hereupon directed."

The ſame may be inſerted in the *alias*, if the plaintiff pleaſes, and then both the *alias* and *pluries* are returnable in the king's bench or common pleas; and the *pluries* always determines the power of the ſheriff to hold plea of the replevin in the county; and ſo doth the *alias*, where the ſaid clauſe of *vel cauſam nobis certifices, &c.* is inſerted. The reaſon is, becauſe this clauſe gives either party a right to call upon the ſheriff, in the courts above, to give an account of the execution of the writ; and this on the pretence or ſuppoſition, that the ſheriff hath not legally executed the writ. The ſheriff, thus called upon, cannot give the court an account how he hath executed the writ, but by his return on the writ itſelf; and that cannot appear judicially to the court, till the writ and

and the return be filed; and the ſheriff having thus parted with the writ, he has no authority to proceed farther in the court below.

By this means the plaintiff in replevin may controvert the ſheriff's return, and ſhall recover damages againſt him, if it be found to be falſe, or not duly made.—This is allowed the plaintiff, not only for his damages, but alſo to intitle the king to a fine againſt the ſheriff for his contempt; and is the moſt expeditious way to oblige the ſheriff to make the deliverance fairly, that the plaintiff may not want his beaſts to carry on his huſbandry. But if the ſheriff injures the defendant in the execution of the replevin, by taking ſome of his cattle, the defendant has his action of treſpaſs againſt him to puniſh him, as in all other caſes of treſpaſs. Here we may obſerve one thing peculiar to this writ of replevin, that the defendant on the return of the *alias* and *pluries* has no day in court; nor is he ſo much as ſummoned to appear by the writ in the court above; whereas in all other actions, the defendant by the very original is put to his pledges for his appearance.—But the reaſon of the difference is this. In other originals, the defendant is but ſummoned to anſwer the plaintiff's demands, and the plaintiff by ſuch writ gets nothing from the defendant till the event of the ſuit, and therefore the defendant muſt have a day in court by the original.—But in replevin the plaintiff hath his beaſts reſtored to him on the execution of his writ, and the defendant ſhall never have return, unleſs in

his avowry he can juſtify the caption; ſo that from hence it appears the defendant need not be ſummoned in this writ; becauſe it is plainly for his intereſt to do ſo, otherwiſe he can never have a return of the cattle.—

1 Ro. Abr. 581. Thus the defendant becomes plaintiff or actor.—Hence it follows that the parties in replevin, may appear and plead at any other term than that in which the replevin is returned; becauſe having no day in court on the return, as is before obſerved, there can be no diſcontinuance of the ſuit, though the plaintiff ſhould not declare in the ſame term.—If the plaintiff ſhould not declare in replevin, the defendant, though he hath no day in court, may however come in, and oblige the plaintiff by rule of court to declare; becauſe otherwiſe the defendant could never have the judgment of the court, for a return of the beaſts (*a*).

Offic. Brev. 413. Dyer 246. a. Raſt. Entr. 570. a.

But if the plaintiff ſhould of himſelf declare without any compulſion from the defendant, as he may do, the defendant is brought into court by attachment, *&c.* to plead; and if the plaintiff ſhall obtain judgment by default, what remedy hath he for his damages?

(*a*) Where the plaint in replevin was removed by the defendant into the court of *C. B.* from an inferior court by a recordari facias loquelam, which was filed on the appearance day of the return, and a rule to declare was given, the Court held that the defendant might ſign a judgment of non proſ. for want of declaring, without demanding a declaration, as in other actions. James v. Moody, 1 H. Bl. 282. vide 2 Crompt. Pract. 239.

It

It is uſual now for the plaintiff to take out the replevin, *alias* and *pluries*, at the ſame time; and if he has a mind to take the cauſe at once out of the ſheriff's hands, he may deliver the *alias* or *pluries* as he thinks fit to the ſheriff, without ever ſhewing him the original writ.—By this the plaintiff, as is already obſerved, has a right to call for the ſheriff's return, and the ſheriff ought himſelf to appear in the court above, to purge his contempt, for diſobeying or not executing the original writ, which the law preſumes was delivered to him; and then the ſheriff may excuſe himſelf by making an honeſt return on the *alias* or *pluries*,—*& quod nullum aliud breve, &c.* came to his hands. And thus the plaintiff, if he pleaſes, may at once ouſt the ſheriff of his juriſdiction, without the trouble of removing the plea out of the ſheriff's court by *pone*. F. N. B. 68. E. Raſt. Ent. 570. a.

III. We come now to the proceſs in replevin to make the defendant appear.

And here it is to be known, that the replevin is *vicontiel*, and is a commiſſion to give the ſheriff authority to gage deliverance of the beaſts, and therefore there is no day given to the defendant by this writ. But on this commiſſion the ſheriff makes out a precept to deliver the beaſts, and alſo an attachment to the defendant to appear at the next court day.—So if it be by plaint, the precept is made to the bailiff to deliver the beaſts, and to attach the defendant. And the reaſon why an attachment is the firſt proceſs, is, that replevin complaining of a tortious taking, Reg 81.

ing, is in nature of a treſpaſs; and there an attachment *per plegios* is the firſt proceſs, leſt the defendant ſhould eſcape.

But if the ſheriff do not execute the replevin, then an *alias* goes out, in which there may be a *vel cauſam nobis ſignifices*; and the reaſon is, that the plaintiff being deprived of the uſe of his beaſts, which he is obliged to ſuſtain in the pound, the law allows that he ſhould in the *alias* inſert the third proceſs; becauſe though the officer, as a defaulter, is not anſwerable for not executing meſne proceſs, till after two defaults; yet, becauſe the beaſts may be eloigned, the *withernam* may iſſue on the ſecond proceſs, and the *cauſam nobis ſignifices*, be put in the *alias*. And this *alias* is returnable into the king's bench or common pleas. In the common pleas, becauſe it is a civil plea; and in the king's bench, becauſe it is in the nature of a treſpaſs. It is alſo returnable into chancery, becauſe he may have a *withernam* thence upon an *elongata*, ſince there is another original, *viz.* a *pluries*, which is yet to be iſſued out of that court.

If there be not *cauſam nobis ſignifices*, it is only *vicontiel*, as the firſt writ. In the *pluries* they muſt put in the clauſe, *vel cauſam nobis ſignifices*, becauſe there have been two neglects already in the proceſs.—When the *pluries* iſſues, it has been much diſputed whether the ſheriff's *vicontiel* power be determined. And it is ſaid, in one caſe, that ſince the writ is to replevy, *vel cauſam ſignifices*, the *vicontiel* power continues.—But if the

2 H. 7. 5. Fitz. Abr. tit. Replev. pl. 16.

the ſheriff does not replevy, then he is to ſhew cauſe why he did not; and this is argued to be the ſenſe of the writ, from the disjunctive words contained in it.

But I take it, that the *vicontiel* power is determined by the *pluries*. 1. Becauſe the ſheriff has been twice guilty of neglecting his duty, and therefore is not to be truſted with judicial power. 2. He is anſwerable to the court how he has obeyed the writ; and therefore the court muſt have the writ, to ſee whether he has done his duty or not. And if the court be entitled to the writ, to ſee whether the officer has done his duty, he cannot proceed on the writ. Fitz. Abr. *ubi ſupra.*

[The *pluries* replevin ſuperſedes the proceedings of the ſheriff, and the proceedings are upon that writ, and not upon the plaint; as they are, when the plea is removed by *recordari*. *Ld. Raym.* 617.]

By the *pluries* there is no day in court, either to the plaintiff or defendant, but only to the ſheriff in order to fine him for diſobeying the firſt writ. [But though there is neither ſummons nor attachment in the *pluries*, yet the return of it is a good day in court to the parties. And the entry in ſuch caſe is, that the defendant *attachiatus eſt ad reſpondendum de placito quare cepit, &c.* for though there is no actual attachment, yet there is an attachment in conſequence of law, the defendant being obliged to appear upon the peril of a *withernam*. *Ld. Raym.* 617. *Salk.* 583. S. C.] If the parties neglect

to

to appear on the return of the *pluries*, the way to give them day, is as follows.

If the plaintiff comes into court, and *obtulit ſe*, at the day on which the ſheriff is to ſhew cauſe to that court, why he did not execute the firſt *vicontiel* proceſs, there, as it appears by the entries in *Raſtal*, he ſhall have an attachment againſt the defendant, to bring him in to anſwer, and this writ gives them both a day in court.

Raſt. Ent. 570. a.

The reaſon is, that replevin is in nature of a treſpaſs, and on every treſpaſs the attachment is the firſt proceſs; and therefore as well in the ſheriff's court below, as in the court above, the plaintiff may have an attachment in the firſt proceſs, and if the defendant does not appear, and *nulla bona* be returned, then on the ſtatute 25 *E.* 3. *c.* 17. they may have a *capias* and proceſs of outlawry.—But at common law, there was only a diſtreſs infinite; becauſe there was no fine to the king on the replevin; unleſs where the *elongata* or claim of property was returned by the ſheriff; for theſe being contempts of the king's proceſs, there was a fine at common law, and therefore a *capias* in the common proceſs came in by the ſtatute.

Bro. tit. Jour. pl. 82.

But if the defendant comes in at the day the ſheriff has in court, he cannot demand the plaintiff, becauſe the plaintiff has given the defendant no day in court; and if the defendant hath no day, he cannot demand the plaintiff under the peril of a nonſuit; and therefore the method is for the

the defendant to have a ſpecial writ to warn the plaintiff to come into court and proſecute his plaint, which is in nature of a *venire*; and if the plaintiff does not come into court at the return of ſuch writ, then he ſhall be nonſuited, and the pledges amerced.—In the ſame manner where there is a vitious *pone*, that gives the defendant no day in court; yet the record being removed, the court proceeds on the firſt writ; and on ſuch writ if the defendant appears, the plaintiff is not demandable, becauſe there is no day given to the defendant, but he has a ſpecial writ to warn the plaintiff to come in and proſecute, and if the plaintiff does not on ſuch writ appear, he is nonſuited. F. N. B. 69. M.

IV. Of the proceſs where the goods are eloigned; and herein of the writ of *withernam*.

Withernam is derived from the Saxon words *weder* (other) and *naam* (diſtreſs) ſignifying another diſtreſs, inſtead of the former, which was eloigned. *Vetitum namium* ſignifies a forbidden diſtreſs; and therefore though a diſtreſs were originally lawful, yet if it be detained againſt the replevin, it is *vetitum namium* and unlawful. 2 Inſt. 140, 1. Spelm. *de verbis namium et vetitum namium.*

The *withernam* is part of the *lex talionis*, which as it prevailed in the caſes of maihem, where the judgment of old was in this kingdom,—eye for eye, and tooth for tooth,—ſo was it in the caſe of taking and detaining againſt pledges,—beaſt for beaſt.

Withernam

Withernam was two-fold.

In the county below; and

In the courts above.

Reg. 82. 1. In the county below, though the ſheriff's bailiff returned that the beaſts were eloigned, yet the *withernam* did not IMMEDIATELY go, becauſe the defendant was not to loſe his own beaſts on the return of a bailiff, againſt whom, if the return were falſe, he could have no ſatisfaction.—Therefore in ſuch caſe, there was an inqueſt of office holden by the ſheriff, to ſee whether the beaſts where found to be eloigned or not; and if the beaſts were found eloigned, then there iſſued a *withernam*, for the eloignment found by the jury, *ſecundum legem talionis*.

2. In the courts above, the *withernam* is awarded on the *elongata* returned. For the king's miniſter having returned, that the beaſts were eloigned, ſo that he could not do execution, there is a proper ground to award this proceſs—

Firſt, becauſe the ſheriff is liable for a falſe return, who is a perſon ſufficient to anſwer the party. Secondly, becauſe the ſheriff's return is ſuppoſed to be true till the contrary appears. And there is no miſchief to the defendant in this caſe, ſince on producing the cattle which he has taken, he may have his beaſts again; and therefore it was proper ſuch a writ ſhould

go

go out *ſecundum legem talionis*, on the ſheriff's return, *without any inqueſt*, rather than the plaintiff ſhould want his cattle, and his huſbandry ſtand ſtill in the mean time.

This writ lieth where a man takes the goods or cattle of another man, and the party ſueth a replevin by writ, and an *alias* and *pluries*; and upon the *pluries* the ſheriff doth return, that the cattle or goods are eloigned, *&c.* then this writ of *withernam* ſhall iſſue out of the court where the *pluries* is returned;—returnable in the king's bench or common pleas. And the form of the writ is ſuch: F. N. B. 73. E.

" *Rex vic. Linc. ſalutem. Quum pluries tibi præceperimus, quod juſte, &c.* A. *averia ſua quæ* B. *&c. vel cauſam, &c. quare mandatum noſtrum, pluries tibi inde directum, exequi noluiſti vel non potuiſti; ac tu nobis ſignificaveris, quod poſtquam prædictus* B. *averia prædicti* A. *cepit in comitatu tuo, ea fugavit de comitatu prædicto in comitatum* B. *per quod ea eidem* A. *replegiare non potuiſti; nos malitiæ ipſius* B. *obviare volentes in hâc parte, tibi præcipimus quod averia prædicti* B. *in ballivâ tuâ inventâ, ſine dilatione capias in withernam, & ea detineas, donec eidem* A. *averia ſua prædicta ſecundum legem & conſuetudinem regni noſtri replegiare poſſis, juxta tenorem mandatorum noſtrorum prædictorum, prius tibi, &c.*"

" *George* the Third, *&c.* To the ſheriff of *&c.* greeting: Whereas we have often com-

commanded you that juſtly, &c. to *A.* his beaſt, which *B.* &c. or the reaſon, &c. wherefore you would not or could not execute our command hereupon often directed to you; and you have ſignified to us that after the aforeſaid *B.* the beaſts of the aforeſaid *A.* had taken in your county, he drove them out of the aforeſaid county into the county of *B.* by reaſon whereof you could not replevy them to the ſaid *A.* We, being deſirous to prevent the miſchievous deſign of the ſaid *B.* in this behalf, do command you, that without delay you take *in withernam* the beaſts of the aforeſaid *B.* found in your bailiwick, and detain them until you are able to replevy to the ſaid *A.* his beaſts aforeſaid according to the law and cuſtom of our realm, and purſuant to the tenor of our commands aforeſaid, before to you, &c."

31 H. 8. 16. But this writ does not lie upon ſuggeſtion only that the beaſts are eloigned, by reaſon whereof the ſheriff cannot replevy them, &c. for this being an award *ſecundum legem talionis*, cannot be on a ſurmiſe, but only be where the eloignment is found by inqueſt below, or returned above, by the proper officer.

F. N. B. 73. E. 22 H. 6. 22. And this writ ſhall not iſſue out of chancery, unleſs *elongata* be returned into that court upon the *alias*, &c. for the *elongata* being the foundation of the *withernam*, wherever the *elongata* is returned, there the *withernam* muſt be awarded; and ſince the *alias*, as it is ſaid is returnable into chancery,

cery, the *withernam* muſt thence iſſue. But though it goes out from thence, it is returnable into one of the benches, becauſe it gives the defendant day thereon to proceed; for ſince the defendant's goods are taken *ſecundum legem talionis*, he muſt have a day given to diſpute the legality of ſuch taking.

The defendant ſhall have a day in this writ by attachment, and not otherwiſe; as if *elongata* be returned on the *pluries replegiari facias*, then the writ of *withernam* has this clauſe,—" *Et ſi querens fecerit, &c. tunc pone defendentem, &c. ad reſpondendum tam domino regi de contemptu, quam præfato querenti de captione et injuſtâ detentione catallorum prædictorum.*" F, N. B. 73. F. 7 H. 4. 27. 45 E. 3. 26. 35 H. 6. 47. Dyer 189.

" And if the plaintiff ſhall make, *&c.* then put the defendant, *&c.* to anſwer as well the lord the king for the contempt, as the aforeſaid plaintiff for the taking and unjuſt detention of the aforeſaid cattle."

The attachment is put into this writ, becauſe it is not a *vicontiel* writ, as the replevin, but a judicial writ, founded on the ſuppoſition of an original unlawful taking; and likewiſe of a contempt, by not permitting the ſheriff to gage deliverance.

But it ſeems there had been no ſuch clauſe in the *withernam*, if it had been on a plaint in the county; for the ſheriff cannot upon his plaint puniſh the eloignment, as a contempt of the authority of the king, ſince it is only a contempt of the proceſs Dyer 189. 44 Aſſ. 15.

of his own court. For the ſame reaſon it ſeems, that if a plaint be removed by *recordari*, which gives the parties day in court, the *withernam* ſhall go without ſuch ſpecial attachment, to anſwer the contempt of the ſheriff's court below. But if the replevin had been by writ, and ſuch writ had been removed by *pone*, and the ſheriff had returned an eloignment, there it ſeems the attachment for the contempt had been in the *withernam*, becauſe there the plaintiff had been attached for his contempt to the king.

F. N. B. 73. G. The writ of *withernam* ought to rehearſe the cauſe which the ſheriff returneth for which he cannot replevy; as to ſay,

" *Ac poſtquam prædictus* B. *catalla vel averia illa cepit, catalla vel averia illa* (*aut bovem vel equum illum*) *elongavit extra ballivam tuam, ita quod nullam deliberationem inde, eidem* A. *facere potuiſti, ſicut nobis ſignificaſti, &c. Nos tibi præcipimus quod catalla vel averia, &c. predicti* B. *ſine dilatione cap' in withernam, et ea detineas donec eidem* A. *&c.*"

" And after the aforeſaid *B.* had taken the cattle or beaſts, he eloigned the cattle or beaſts, (or ox or horſe) aforeſaid out of your bailiwick, ſo that you could not make any delivery of them to the ſaid *A.* as you have ſignified to us, *&c.* We command you that without delay you take *in withernam* the cattle or beaſts, *&c.* of the aforeſaid

ſaid *B.* and them detain until to the ſaid A. *&c.*"

And there are very many cauſes that the ſheriff may return upon the *pluries*, wherefore he cannot replevy, whereof divers of them do appear in the *Regiſter*, which may be ſeen there. Reg. 82.

And if the ſheriff return upon the *pluries* replevin, that he hath ſent unto the bailiff of the liberty, who hath return of writs, and that the bailiff hath given anſwer, that he cannot execute the writ, becauſe he cannot have a view of the cattle or goods which were taken; then the court in which ſuch return is made, ſhall award a writ of *withernam* directed unto the ſheriff; and the ſheriff ſhall thereupon make his precept unto the bailiff of the liberty; and if the bailiff of the liberty doth not make a return thereof unto the ſheriff, then the ſheriff ſhall return the whole matter in court, and thereupon the court ſhall award a writ of *withernam*, and a *non omittas* with the ſame; and the form of the writ ſhall be ſuch: F. N. B. 74. A.

" *Rex vic.* B. *ſalut'. Cum plur' &.* [*uſq*; *ibi*, ' *vel non potuiſti'*,] *ac* R. *de* C. *balliv' libertat' de* J. *cui return' brev' noſtr' habere feciſti, tibi reſponderit, quod executionem brevis illius facere non potuit, &c. ſicut tu nobis ſignificaſti; per quod tibi præceperimus, quod averia prædicti* B. *in ballivâ tuâ ſine dil'one caperes in withernam, et ea detineres donec eidem* A. *averia ſua, &c. vel cauſam nobis ſignificares,*

&c. ac tu nobis returnaveris, qnod idem R. *balliv. libertat. præd. cui return. &c. habere feciſti, nullum tibi inde dedit reſponſ'. Tibi præcipimus, quod non omittas propter libertat' prædictam, quin eam ingrediaris, et capias &c. in withernam, donec, &c. juxta, &c. Teſte, &c.*"

"*George* the Third, *&c.* To the ſheriff of *&c.* greeting: Whereas many times, *&c.* ['until or could not execute, *&c.*'] And *R.* of *C.* bailiff of the liberty of *J.* whom you have made to have the return of our writ, hath anſwered you that he could not execute that writ, *&c.* as you have ſignified to us; wherefore we commanded you, that you ſhould without delay take *in withernam* the beaſts of the aforeſaid *B.* in your bailiwick, and them detain until to the ſame *A.* his beaſts, *&c.* or ſhould ſignify to us the reaſon, *&c.* why you could not; and you have returned to us, that the ſame *R.* bailiff of the liberty aforeſaid, whom you have made to have the return, *&c.* gave you no anſwer thereupon. We command you, that you do not omit by reaſon of the aforeſaid liberty, but that you enter it, *&c.* and take, *&c.* in *withernam* until, *&c.* purſuant, *&c.* Witneſs, *&c.*"

F. N. B. 74. B. Stat. Marlb. c. 21. Weſtm. 1. c. 17.

And if a man's cattle be diſtrained, and he ſue a replevin, by plaint made unto the ſheriff, for which the ſheriff makes a precept to the bailiff to replevy them, and the bailiff return at the next county court, that he cannot replevy the cattle, becauſe they are eloigned, or that he cannot have view of

of the cattle; then the ſheriff in the ſame county court, ought to make enquiry, if it be true which is returned; and if it be ſo found by the jury, then the ſheriff, *ex officio*, ſhall make a precept unto his bailiffs in the nature of a *withernam*, to take as many cattle of the other party.

[This precept muſt be in writing, and not by word only; becauſe it is in nature of a ſecond execution of the award of the county court, and therefore not like the plaint in replevin, which, for the ſuddenneſs of the thing, may be verbal only. But in the Regiſter it is ſaid that the ſheriff is not bound to make ſuch precept without a writ.] Dalt. Sher. 437. Reg. 82.

And if the ſheriff make ſuch precept, to take the other's cattle *in withernam*, and the bailiff will not execute the writ, then the party may have a ſpecial writ out of the chancery, directed unto the ſheriff, commanding him to do *withernam*, and to do execution of the firſt judgment; and the writ ſhall be ſuch:

" *Rex vic. &c. Monſtr' nobis* A. *quod cum* B. *et* C. *averia prædicti* A. *cepiſſent et injuſte detinuiſſent, idemq*; A *coram te proſecutus fuiſſet, pro averiis prædictis ſibi, ſecundum legem et conſuetud. regni noſtri, replegiandis*; *ac licet per* J. *ballivum tuum, quem ad averia prædicta prædicto* A. *repleg' miſiſti, teſtatum fuerit, et per inquiſitionem (prout moris eſt) in pleno com' tuo factum compertum, quod idem balliv' viſum de eiſdem averiis habere non potuit, ad eadem*

præfat' A. *replegiand'*; *per quod in pleno com' tuo conſideratum fuit, quod averia prædict'* B. *et* C. *in ballivâ tuâ caperentur in withernam, et detinerentur quouſq; eidem* A. *averia ſua prædicta ſecundum legem et conſuetud' regni noſtri repleg' poſſint; idem tamen* A. *executionem conſiderationis prædictæ nondum aſſecutus eſt, ad damnum ipſius* A. *non modicum et gravamen; et quia præfato* A. *ſubvenire volumus in hâc parte, tibi præcipimus quod ſi ita ſit, averia prædictorum* B. *et* C. *cap' in withernam, et ea detineas, quouſq; eidem* A. *averia ſua prædicta repleg' poſſis, ſecundum legem et conſuetud' regni noſtri, et juxta conſideration' prædictam, &c.*"—

"*George* the Third, *&c.* To the ſheriff of *&c. A.* hath ſhewn to us, that whereas *B.* and *C.* took and unjuſtly detained the beaſts of the aforeſaid *A.* and the ſame *A.* before you proſecuted for the beaſts aforeſaid to be replevied to him, according to the law and cuſtom of our realm; and although it was atteſted by *I.* your bailiff, whom you ſent to replevy the beaſts aforeſaid for the aforeſaid *A.* and the fact found by inquiſition (as uſual) in your full county, that the ſame bailiff could not have a view of the ſame beaſts in order to replevy the ſame to the aforeſaid *A.* whereupon in your full county it was conſidered, that the beaſts of the aforeſaid *B.* and *C.* in your bailiwick ſhould be taken *in withernam* and detained until to the ſame *A.* his beaſts aforeſaid, according to the law and cuſtom of our realm, ſhould be replevied; yet the ſame *A.* hitherto hath not obtained execution of the conſideration aforeſaid, to the no ſmall damage and grievance of

of the ſaid *A.* and becauſe we are willing to aſſiſt the aforeſaid *A.* in this behalf, we command you, that if it be ſo, you take *in withernam* the beaſts of the aforeſaid *B.* and *C.* and them detain until you are able to replevy to the ſame *A.* his beaſts aforeſaid, according to the law and cuſtom of our realm, and purſuant to the conſideration aforeſaid, *&c.*"

[This is a writ *de executione judicii*, and therefore recites the award of the county-court as a judgment: *ſed quære*; for, in a caſe reported by *Salkeld*, the court denied that a *withernam*, is an execution, for that cannot be before judgment; and they held it to be only a meſne proceſs. But in this writ, there is no attachment for contempt againſt the defendant; becauſe the proceeding was not by the king. And this writ ſeems to be deſigned to prevent the ſheriff's ſleeping upon the judgment of *withernam* in his own court; for though it be not returnable into any of the king's courts, yet the king's writs are always to be obeyed, and an attachment lies upon the ſheriff's diſobedience.] Reg. 83. a. Salk. 582.

And by this writ it appears, that the ſheriff may award *withernam*, on replevin ſued by plaint, if it be found by inqueſt in the county, that the cattle are eloigned, according to the bailiff's return, *&c.* But upon the *withernam* awarded in the county, if the bailiff do return that the other party hath not any thing, *&c.* he ſhall have an *alias* and a *pluries*, and ſo infinite; and he hath no other remedy there, becauſe no *capias* lies but in the king's courts. F. N. B. 74. E. 9 E. 4. 48.

F. N. B. 74. C. 20 E. 4. 11. 28 E. 3. 57.

But upon a *withernam* returned in the king's bench or common pleas, if the ſheriff do return that the party hath not any thing, *&c.* there a *capias* ſhall be awarded againſt him, and *exigent* and proceſs of outlawry.

F. N. B. 74. D. 2 H. 4. 9. Bro. Abr. tit. Withernam, pl. 3.

In replevin ſued by writ, if at the *pluries* returnable the ſheriff doth return, *quod averia elongata ſunt, &c.* and the defendant appears, the plaintiff ſhall not have a *withernam*; becauſe the defendant appears at the day when the ſheriff returns the *pluries*; which is a voluntary appearance, ſince there is no day given him; therefore he has time to purge his contempt, by gaging deliverance of the cattle. But if he doth not gage deliverance of the cattle, it ſeems they may either award a *withernam*, or commit him for his contempt.

And if the defendant's cattle be taken *in withernam*, they ſhall not be delivered to the plaintiff, but the ſheriff ſhall keep them *quouſque, &c.* and the ſame appears by the words of the writ. But it is ſaid that it is the uſage in the king's bench, that they ſhall be delivered unto the plaintiff; by which it ſeems that the form of the writ of *withernam*, there is different from that in the Regiſter.

2 H. 4. 9.

This is a point that has been ſeveral times controverted, and ſome of the clerks made the diſtinction between the practice of the king's bench and common pleas; but the true diſtinction is between the ORIGINAL and JUDICIAL writ of *withernam*; by the former the ſheriff is to take *et ea detinere donec eidem, &c.* which

Reg. Orig. et Bro. Abr. tit. Withernam, l. 3.

&c. which obliges the ſheriff to detain the beaſts in his own cuſtody; but in the judicial *withernam* the words are, *capias in withernam, et ſalvo et ſecure cuſtodiri facias, donec, &c.* which is to be interpreted, that he muſt deliver them to the plaintiff upon good ſecurity, for that is making them to be ſafely kept.

The reaſon of the difference is this, that on the *vicontiel* writ below, where it was found that the beaſts were eloigned, the award of taking the defendant's beaſts could be only *quouſque* he gaged deliverance; for even an execution in the ſheriff's court was no more than levying a pain, to make the party perform the ſentence of that court; for they could not execute the ſentence of that court, by changing the property, or delivering it over to the ſuitor, but by levying pains to make them perform it. And when the return of *elongata* is made into chancery, the *withernam* goes out as a *vicontiel* proceſs, and is conceived in the ſame manner as it is below; and therefore in the writ *de executione faciendâ in withernam*, there is no return into the king's courts. But where the *elongata* is returned into the king's bench or common pleas, there the *withernam* goes out as a judicial proceſs, and there the courts, who can alter the property, have made it *ſecundum legem talionis, viz.* that the defendant's goods ſhall be delivered to the plaintiff to make uſe of them, until his own are reſtored. And it was ſaid to be the practice of the king's bench, becauſe that was the court where

Raſt. 702. 4. Co. Ent. 612. b. 1 Co. 75. Dyer 189.

where the *lex talionis*, in caſe of murder and *maihem*, firſt ſettled the practice.—

Fitz. Abr. tit. Gage, Deliverance, pl. 8.

Where the ſheriff in his county levies goods of the plaintiff *in withernam*, after a return hath been awarded on a nonſuit, if he doth not deliver them to the defendant, he ſhall have an action againſt the ſheriff.

25 E. 3. 47. Fitz. Abr. tit. Gage, Deliverance, pl. 8.

On a *recordari* the plaintiff declares, and the defendant avows; the plaintiff prays the defendant may gage deliverance, and the defendant pleads that part of the beaſts were delivered, and the other dead through the plaintiff's default; to this the plaintiff replies, that he commenced a replevin by plaint, that the ſheriff made deliverance, and took ſecurity to have return, or the value; that he was nonſuit in replevin, and on this the plaintiff took from him 20*s.* on a *withernam*, and of this he would have the defendant gage deliverance; and it was inſiſted that it ought to be delivered by the defendant, becauſe he had avowed the taking, and that the defendant might have an action againſt the ſheriff: but in order to have deliverance, the plaintiff was forced to take iſſue, that the ſheriff delivered the 20*s.* to the defendant.

Raſt. Ent. 701. b. 35 H. 6. 47. Stat. Marlb. c. 3. 2 Inſt. 145. Dalt. Sher. 435.

The writ of *withernam* is *ad reſpondendum tam domino regi de contemptu, quam parti de damno et injuriâ*; for to eloign the goods was to ſtop the replevin, and hinder the plaintiff from purſuing his juſt right, for which he was fineable to the king.

If on the *withernam* the ſheriff returns that the defendant hath no goods, a *capias* iſſues and

and proceſs of outlawry; and this was at common law, both in the writ of *withernam* and the writ *de proprietate probandâ*: becauſe, on both theſe writs, a contempt is ſuppoſed and appears againſt the defendant by the return of the ſheriff; and therefore the party is fineable for his contempt: and wherever there was a fine for the king, a *capias* lay at common law, as it did for a treſpaſs *vi et armis*, where there was a fine for the king. The 25 *E.* 3. *c.* 17. gives the *capias* in replevin as meſne proceſs; but this *capias* does not lie in the ſheriff's court, for it is given as in account, which was always in the king's courts, on the ſheriff's return of *nulla bona* upon the attachment.

Where the *retorn' habend'* is awarded for the defendant, *withernam*, *capias*, and proceſs of outlawry lies againſt the plaintiff, becauſe there likewiſe is a contempt againſt the king.

And here we muſt take notice, that the ſtatute of *Marlb. c.* 4. which ſays, that *Nullus de cætero faciat ducere diſtrictiones quas fecerit extra com' in quâ captæ fuerint, et ſi, &c. puniatur per redemption' veluti de re factâ contra pacem*, and gives a fine to the king upon an eloignment returned by the ſheriff in the king's court, is but in affirmance of the common law. 2 Inſt. 106.

If the ſheriff return that the diſtreſs is eloigned, ſo that he cannot deliver them upon the replevin, or upon the *retorno habendo*, the *withernam* goes; for where it appears

pears there cannot be a delivery made of the ſame, the law commands an equivalent *ſecundum legem talionis.*

F. N. B. 74. E. In a replevin at the *pluries* returnable, if the ſheriff doth return *quod averia elongata ſunt, &c.* and the defendant doth appear, and plead that he did not diſtrain them, the plaintiff ſhall not have *withernam.* And ſo if the defendant at the *pluries* returned, appear and plead that the cattle were dead in the default of the plaintiff, the plaintiff ſhall not have *withernam*; for if he did not take them, or if the cattle be dead by the default of the plaintiff, then, *ſecundum legem talionis*, he ought not to have the defendant's cattle; and therefore, while this is in iſſue, no *withernam* ought to be awarded.

F. N. B. 74. E. 30 E. 3. 9. Ld. Raym. 614. And if in replevin *withernam* is awarded, and afterwards the defendant avows the taking as his proper goods, or for a heriot; or denies the taking; the plaintiff ſhall gage deliverance of the *withernam*; for the *withernam* ought not to have been awarded. But the defendant ſhall not gage deliverance of the goods taken, ſince he claims them as his own. And though the defendant might have come *in pais* and claimed property, yet, whenever he claims, it is ſufficient to ſtop the deliverance.

Carth. 287.

7 H. 4. 28. If *withernam* be taken, and afterwards the defendant comes into court and makes conuſance as bailiff to *J. S.* and prays aid of him, who joins in aid, the defendant ſhall have deliverance of the beaſts *in withernam*; for it

it belongs to the lord to make deliverance of the firſt beaſts, and not the bailiff; becauſe the bailiff took them only as a ſervant, and therefore his cattle ought not to be taken as a compenſation for the maſter's not reſtoring the diſtreſs.

[The defendant in replevin avowed for *damage feaſant*, and had judgment for a return and damages; the court awarded a *retorno habendo*, the ſheriff returned *elongata*, and in conſequence a *withernam* iſſued; upon this, the plaintiff came into court, and tendered the damages aſſeſſed by the jury, and prayed a ſtay of the *withernam*, which was granted by the court, on the plaintiff's paying a ſmall fine for his contempt. 2 Leon. 174. pl. 211.

And in another caſe, where the plaintiff's cattle had been taken on a *withernam*, which iſſued under ſimilar circumſtances, the plaintiff ſatisfied the defendant his damages, and then prayed a writ of reſtitution of his cattle; upon which the court adjudged, that though the cattle were not repleviſable, yet that, upon ſatisfaction, they ſhould be reſtored to the plaintiff by a writ of reſtitution; and this they declared to be the uſual courſe.] Cro. Eliz. 163.

And the defendant in ſome caſes ſhall have a *withernam* againſt the plaintiff; as if the defendant has a return awarded for him, and he ſueth a writ *de retorno habendo*, and the ſheriff return upon the *pluries*, *quod averia elongata ſunt*, *&c.* he ſhall have a *ſcire facias* againſt the pledges, according F. N. B. 74. F. Tr. 7 R. 2.

to

to the ſtatute of *Weſtm.* 2. *c.* 2. and if they have nothing, then he ſhall have *withernam* againſt the plaintiff, of the plaintiff's cattle.

5 H. 5. 7. But in one caſe, it was held, that the avowant may have a *withernam* preſently, for it was at the common law.

5 H. 5. 7. Fitz. Abr. tit. Proceſs, 115. Hence it has been doubted, whether on the ſtatute of *Weſtm.* 2. *c.* 2. that gives pledges *de retorno habendo*, it be neceſſary to ſue out a *ſcire facias*, and to have a *nihil* returned, before you can have a *capias in withernam*; inaſmuch as you muſt ſhew it impoſſible to have the cattle returned, before you can, by the *lex talionis*, come at the goods of the plaintiff. But it ſeems the better opinion, that the ſtatute only gives him another ſecurity and remedy by *ſcire facias* againſt the pledges, and does not take away nor alter the remedy given by the common law.

11 H. 4. 10. F. N. B. 74. A. Bro. Abr. tit. Withernam, pl. 5. In replevin, *withernam* is awarded againſt the defendant, and afterwards the defendant claims property, and the parties are at iſſue; the plaintiff gages deliverance of the *withernam*, and a writ iſſues for him to make deliverance accordingly; the ſheriff returns *elongata*, on which *withernam* is awarded againſt the plaintiff, and upon *nil* returned, a *capias* iſſues; then the iſſue is found for the plaintiff, upon which he has judgment.—Now upon the return of the *pluries* againſt the plaintiff, the defendant prays an *exigent* againſt him, *& habuit*; and by *Thirwit* the defendant ſhall recover damages for the detaining of the *withernam* in this action.

action. The reaſon is, that as ſoon as the defendant claimed property, the *withernam* beaſts were detained unjuſtly by the plaintiff, and the ſubſequent verdict, though found for the plaintiff, did not make the detainer, which was in itſelf unlawful, lawful *ex poſt facto*; for the plaintiff could not detain beaſts *in withernam*, when the deſendant claimed the thing replevied as his own property, and not as a diſtreſs. The *withernam* proceeds on the ſuppoſition that the original taking was a diſtreſs, and if the firſt beaſts had been the defendant's, they ought not to have been removed out of his poſſeſſion, much leſs ought other beaſts to have been taken *in withernam*.

Per Danby and *Moyle*, the defendant ſhall recover damages in *withernam*, on an *elongata* returned on a writ *de retorno habendo*; becauſe, if the *retorno habendo* be entirely to right the defendant, damages muſt be recoverable in caſe the beaſts be eloigned. Others were of a different opinion; and held that it is only a judicial writ to cauſe the beaſts to be returned.—But the better opinion is, that he ſhall have DAMAGES; becauſe by the eloignment he is deprived of the benefit and uſe of the beaſts, which he ought to have been immediately put in poſſeſſion of, in purſuance of the judgment. 35 H. 6. 47. Dyer 41.

If the plaintiff be nonſuit, he may have a ſecond deliverance preſently, and this ſhall be a *ſuperſedeas* to the *retorno habendo*. And if the *retorno habendo* be ſued after the ſecond deliverance granted, the ſheriff ought Dyer ib.

to

to execute the ſecond deliverance. And this prevents the miſchief of the *withernam* againſt the plaintiff.

F. N. B. 74. A. *Note.* 25 Ed. 3. 90. pl. 38. 38 Ed. 3. Avowry 256. 13 Ed. 3. Replevin 37. Dyer 59. Poſt.

A. brings a replevin againſt *B.* and has deliverance, and after is nonſuit, and a return is awarded to *B.* And upon this, an *elongata* being returned, *B.* has the beaſts of *A. in withernam.*—In this caſe, if the plaint was firſt in the county court, and removed into *C. B.* the ſecond deliverance muſt not be ſued of the beaſts delivered *in withernam*, but of the beaſts firſt taken; and the defendant ſhall be put to gage deliverance of the *withernam (quod nota)*; and yet the plaintiff himſelf is poſſeſſed of the beaſts for the taking of which he complains; and if he makes his plaint or count, of the beaſts delivered *in withernam*, it is not good. The reaſon is before given, for the ſecond deliverance is a judicial writ appointed by ſtatute, and therefore muſt in all points purſue the record out of which it iſſues. And the plaintiff cannot declare on the *withernam*, for this is the award of the court upon his eloigning the cattle; and if he is injured by the return of the ſheriff, he has his action againſt him.

Weſtm. 1. c. 17.

Offic. Brev. tit. Withernam.

If the *withernam* be awarded againſt the defendant, on behalf of the plaintiff, *in meſne* proceſs, the ſheriff may take the beaſts of the defendant to any value, as a pain to make him appear. And when the defendant comes in, he will be fined in court, and committed till he has paid that fine, and gaged deliverance of the beaſts; and then

then he can have his own goods reſtored that were taken *in withernam*, and interplead with the plaintiff. And here he cannot plead that either he did not eloign, or that the beaſts were dead in pound; for that is contrary to the *elongata* returned by the ſheriff, and not to be denied; but if it be falſe, he has remedy againſt the ſheriff for his falſe return.

[But the defendant, as appears before, may plead *non cepit*, after the return of *elongata*; and the reaſon is, becauſe the ſheriff muſt either return *deliberari feci*, *elongata*, or that no perſon came to ſhew him the cattle; but he cannot return that they were not taken, for that goes to the point of the writ, which the defendant is to falſify and not the ſheriff. The ſheriff muſt neceſſarily return *elongata* where he cannot make deliverance; and therefore it ſhould ſeem that no action lies againſt the ſheriff for ſuch return, as being falſe. And for the ſame reaſon, becauſe the return of *elongata* was unavoidable, it ſhall not conclude the defendant from pleading *non cepit*.] (*a*) Ld. Raym. 613. Salk. 581. S. C.

If on the *withernam* awarded againſt the defendant, *nulla bona* be returned, a *capias* iſſues againſt the defendant, and on that *capias* if the defendant be taken, he ſhall 9 H. 6. 42.

(*a*) But in an *homine replegiando*, a return of *elongatus* precludes the defendant from pleading *non cepit*, becauſe the writ is for the body of the party, and that as the liberty of man was to be favoured next to his life, nothing can be pleaded till the body is brought in. Skinn. 61, 62.

be in cuſtody until he has paid the fine, and likewiſe gaged deliverance; and if he be not taken, they proceed to proceſs of outlawry.

V. Of the writ *de proprietate probandâ.*

Reg. 83, &c. Brev. Jud. 135.

Co. Lit. 145.

If the replevin be either by plaint or by writ, and the defendant claims property, the ſheriff's power to replevy the beaſts is at a ſtop; becauſe, the defendant claiming the beaſts as his own, the ſheriff cannot re-deliver that property to the plaintiff which is claimed by the defendant; and therefore if the replevin be by plaint, the juriſdiction is at an end by ſuch claim, till the plaintiff purchaſes the writ *de proprietate probandâ*; becauſe no controverſy of property can be determined in the county court without the king's writ.

Dalt. Sher. 435.

On the purchaſing of this writ an inqueſt of office is holden; and if on ſuch inqueſt the property be found for the plaintiff, the ſheriff is to make deliverance; but the defendant may remove it by *recordari*, and put in his plea of property above, and it ſhall be determined by a verdict. But if the inqueſt of office find for the defendant, there is an end of the replevin by plaint, becauſe the property is found for the defendant, and ſo no re-deliverance can be made by the ſheriff. But the plaintiff may bring a new replevin by writ, for what is done on the plaint is no bar, nor has it any concern with the proceedings upon the writ.

If

If the replevin were by original writ, and the defendant claims property, the ſheriff cannot make deliverance any more than he could upon the plaint, and therefore the ſheriff in ſuch caſe returns ſuch claim of property on the *cauſam nobis ſignifices* (on the *alias* or *pluries* replevin,) as a cauſe why he cannot execute the writ; and on this return of the ſheriff, the writ *de proprietate probanda* iſſues, that the plaintiff may not want his beaſts in the mean time; and, if the property be found for the plaintiff, orders a re-deliverance to the plaintiff, and gives the defendant a day in court. And the plaintiff may not only declare on the unjuſt caption, but on the ſubſequent injuſtice of the defendant, in claiming the goods as his own; and here the defendant may likewiſe ſet up his claim of property, and try it by verdict, where the matter will be determined under peril of an attaint.—But if this claim be found againſt the defendant on the inqueſt of office below, he is ſubject to a fine for his falſe claim of property, whereby he has ſtopped the courſe of replevin by hindrance of the deliverance of the goods, which is a contempt of the court, and ſubjects him to a fine; as likewiſe to damages to the party, who wants his goods in the mean time. The defendant muſt appear in proper perſon to anſwer his fine to the king, but after payment of the fine he may appear by attorney; but until payment of the fine, he muſt plead in perſon.

But if the verdict be found for the defendant in the writ *de proprietate probandâ*, Brev. Jud. 135, &c.

Fitz. Abr. tit. Propr. Prob. pl. 5.

there is an end of the replevin, as well by writ as by plaint; for the ſheriff is not by the writ *de proprietate probandâ* to deliver the goods to the plaintiff, unleſs the jury find them to be the plaintiff's. And if the defendant has the goods and poſſeſſes them as his own, they cannot proceed in an action, which ſuppoſes the goods to be re-delivered to the plaintiff. But if the plaintiff has any right to them, ſince the poſſeſſion by the inqueſt is eſtabliſhed on the ſide of the defendant, the plaintiff cannot get back his poſſeſſion of the goods, until he has eſtabliſhed his right in an action of law for the ſame; and therefore he may bring his action of detinue, trover, or treſpaſs, for recovering the goods, but cannot continue his action, whereby the poſſeſſion ſhould be delivered to him.

Co. Lit. 145. 11 H. 4. 4.

A bailiff cannot claim property BELOW when the ſheriff comes to make replevin; becauſe being only ſervant to another, in whoſe right he has taken the goods, he cannot ſay they are his own, and therefore cannot hinder the ſheriff from delivering the goods according to the command of the writ, as the proprietor might (*a*). For though a man by claiming property may prevent his own goods being delivered, yet he cannot hinder other people's goods, be-

Bro. Jud. 137. Theſ. Brev. 170.

(*a*) This is explained to be intended only in reſpect to the county court; for in the king's bench the bailiff is not liable to a fine; and therefore it has been held that there one may make conuſance and claim property by a bailiff. Adj. in Hampſtead v. Oldham. 1 Lev. 90. and 2 Keb. 441. Co. Litt. 145. b. n. 1. 13th. edition.

cauſe

cauſe the ſheriff cannot hear any ſtranger interpoſe againſt his obeying the king's writ. But the owner himſelf ſhews a juſt cauſe why the goods ſhould not be delivered until further enquiry. Yet the bailiff ABOVE may plead property in a ſtranger; for this is a ſufficient reaſon to excuſe him from damages, ſince he has not taken the plaintiff's goods from him. 1 Lev. 90.

VI. Of the proceſs for removing the cauſe out of the inferior court.

Since the replevin is *vicontiel*, and determinable in the inferior court, where the ſuitors are judges both of the law and the fact; —and ſince the ſuitors are not awed by the peril of an attaint, nor the matter of law determined without danger of falſe judgment, from their ignorance or partiality;—the law hath appointed two writs to remove ſuch cauſes out of inferior courts into the ſuperior, and thoſe are the *pone* and *recordari*.

The *pone* is when the proceeding is by WRIT of replevin; for when a writ of replevin iſſues, and it is returned out of the county court, THAT gives the judges above authority to proceed thereon, whether the proceeding below be recorded or not: for the judges want no record from below when they have the king's writ with them. 2 Inſt. 339.

But the *recordari* is to record the proceedings, and when recorded, to return them into the king's bench or common pleas. So

that it gives authority to record thoſe proceedings, that were not of record before; therefore, if the replevin were by plaint, it it muſt be removed by *recordari*, becauſe the courts muſt have their authority by proceedings returned of record.

We ſhall conſider each of them ſeparately.

I. Of the *Pone*.

F. N. B. 89. M.

If the replevin be removed out of the county court into the common pleas, the writ of *pone* ſhall be as follows:

"*Rex vic' Linc' ſalutem. Pone, ad petitionem petentis, coram juſticiariis noſtris apud Weſtm. (tali die) loquelam quæ eſt in com' tuo per breve noſtrum, inter* A. *&* B. *de averiis ipſius* A. *captis & injuſte detentis, ut dicitur, & ſummoneas per bonos ſummonitores præd.* B. *quod tunc ſit ibi, præfato* A. *inde reſponſurus, & habeas ibi ſummonitores & hoc breve.*"— "*George* the Third, *&c.* To the ſheriff of, *&c.* greeting: at the petition of the plaintiff, put before our juſtices at *Weſtminſter* (ſuch a day) the plaint which is in your county by our writ between *A.* and *B.* of the beaſts of ſaid *A.* taken and unjuſtly detained, as is ſaid, and ſummon by good ſummoners the aforeſaid *B.* that he be then there to anſwer the aforeſaid *A.* hereof, and have there the ſummoners and this writ."

And if it be removed into the king's bench, then the writ is ſuch:

"*Rex,*

"*Rex, &c. Pone, ad petitionem petentis, coram nobis ubicunque tunc fuerimus in Anglia, loquelam, &c.*"—"*George* the Third, *&c.* At the petition of the plaintiff, put before us whereſoever we ſhall then be in *England*, the plaint, *&c.*"

The reaſon why the defendant is ſummoned in this writ is, that he being already *attached* in the court below, and having appeared, it is preſumed he would have come in upon the ſummons; and when he hath appeared below to avow his diſtreſs, it is not to be ſuppoſed that the caption is an unlawful caption, on which he ſhould be attached; and therefore, when the plea is removed, the entry is, *quod defendens ſummonitus fuit ad reſpondendum.*

The plaintiff may remove the plea out of the county court, either by *pone* or *recordari*, without cauſe ſhewn, for it is his own delay; but the defendant cannot remove it without cauſe ſhewn; for, ſince it is in delay of the plaintiff, a juſt cauſe ought to appear upon record for ſuch removal. F. N. B. 69. M. 70. B.

There are ſeveral cauſes of removal at common law; as if either party were related to the lord or ſheriff, *&c.* But the ſtat. of *Weſt.* 2. *c.* 2. hath added one cauſe, and that is, if the defendant diſtrain for cuſtoms and ſervices, and the plaintiff pretend to be out of his fee; for by this means the plaintiff recovered his beaſts, and drove the lord to his writ of cuſtoms and ſervices, whereby the lords were often diſpoſſeſſed of their diſtreſſes; and therefore this ſtatute provided that ſuch defendant ſhould, upon ſuch pretence of Reg. 84. F. N. B. 70. A. 2 Inſt. 339.

the plaintiff, remove the plea into the ſuperior courts, and try the tenure in this action.

F. N. B. 70. A. And the cauſe of removal is inſerted in the writ, after the *teſte* thereof, in this manner.

"*Quia* C. *clericus* D. *vicecomitis, prædicti qui frequenter in abſentiâ vicecomitis illius tenet placita ejuſdem comitatus, eſt conſanguineus prædicto* A. *propter quod idem vicecomes favet ipſi* A. *in loquelâ prædictâ, ut dicitur, fiat executio iſtius brevis, ſi cauſa ſit vera et præd'* B. *petit, et aliter non.*"—"Becauſe *C.* clerk of *D.* the ſheriff aforeſaid, who frequently in the abſence of that ſheriff holds pleas of the ſame county, is a-kin to the aforeſaid *A.* wherefore the ſame ſheriff favours the aforeſaid *A.* in the plaint aforeſaid, as is ſaid, let this writ be executed if the cauſe be true, and the aforeſaid *B.* requires it, and otherwiſe not."

Or thus: "*Quia præd'* B. *cepit averia præd. in feodo ſuo pro conſuetudinibus et ſervitiis ſibi debitis, ut dicitur, fiat executio, &c. (ut ſupra")*—"Becauſe the aforeſaid *B.* took the beaſts aforeſaid in his fee for cuſtoms and ſervices due to him, as is ſaid, let execution, *&c.* as above."

Or thus: "*Quia præd'* B. *clamat præd'* A. *eſſe nativum ſuum, et eâ occaſione aſſerit averia præd' eſſe ſua propria, propter quod loquela illa in comitatu deduci non debet, ut dicitur, fiat executio, &c. (ut ſupra.")*—"Becauſe the aforeſaid *B.* claims the aforeſaid *A.* to be his villain, and upon that account aſſerts the beaſts aforeſaid to be his own, wherefore that plaint ought not to be carried on in

the county, as is ſaid, let execution, *&c.* as above."

And the ſheriff cannot return that the cauſe is not true.—But notwithſtanding the ſaid cauſes, the defendant may avow for *damage feaſant*; for the cauſe of removal is no material part of the writ, nor is it traverſable, and therefore the defendant may juſtify the taking and detention of the diſtreſs in any other manner.

7 H. 6. 32. 10 Ed. 2. Avowry 213, 515. 20 Ed. 3. Avowry 130.

But if either plaintiff or defendant remove the ſuit out of the LORD'S COURT, they ought to ſhew cauſe, becauſe they ſhould not ouſt the lord's court of the profits of ſuch juriſdiction, without apparent reaſon.

F. N. B. 70. A.

And it ſeems that ſuch cauſes uſed anciently to be examined, before ſuch writs were granted. So in Chancery they uſed to examine the cauſe of action before the granting of original writs; but this in both caſes is now neglected, and ſuch writs iſſue of courſe.

And the cauſe of removal out of the lord's court ſhall be ſhewn in this manner:

F. N. B. 70. Reg. 84. b.

"*Quia prædictus abbas eſt dominus curiæ de* C. *in qua loquela illa pendet per retornum brevis noſtri, propter quod idem* A. *in loquela præd' in eadem curia juſtitiam conſequi non poteſt, ut dicitur, fiat executio, &c.*" "Becauſe the aforeſaid abbot is lord of the court of *C.* in which that plaint hangs by the return of our writ, wherefore the ſame *A.* cannot obtain juſtice in the plaint aforeſaid in the ſame court, as is ſaid, let execution, *&c.*"

Or

Or thus: "*Quia* J. *Ballivus* K. *archiepiſcopi Cantuar' curiæ ſuæ de* N. *coram quo loquela illa pendet, per retornum brevis noſtri in eâdem curiâ implacitatur per præd.* B. *de quodam debito* 20 *marcarum, coram præf. juſticiariis noſtris per breve noſtrum, propter quod idem ballivus in odium ipſius* B. *favet ipſi* A. *in loquelâ ſuâ præd', ut dicitur, fiat executio, &c.*"—"Becauſe J. bailiff of K. archbiſhop of *Canterbury*, of his court of *N.* before whom that plaint hangs, by the return of our writ in the ſame, is impleaded by the aforeſaid *B.* of a certain debt of 20 marks, before our juſtices aforeſaid by our writ, by reaſon whereof the ſame bailiff out of hatred to the ſaid *B.* favours the ſaid *A.* in his aforeſaid plaint, as is ſaid, let execution, *&c.*"

The former concluſion is proper when the plea is removed at the ſuit of the plaintiff; but the latter when it is removed at the ſuit of the defendant.

21 H. 6. 50. F. N. B. 70. A. *Note.*

If the plaint be removed by the defendant by *pone*, the plaintiff ſhall be demanded at the day in bank, under the peril of a nonſuit, and if he make default, a return ſhall be awarded and no proceſs; but if the plaintiff appear, and the defendant make default, a *diſtringas* ſhall iſſue, and on *nulla bona* returned, then a *capias* and proceſs of outlawry. So if the plaint be removed by *pone* or *recordari* by the plaintiff, there if he make default he ſhall be nonſuit; and if the defendant make default, then ſhall iſſue a *pone per vadios*, and ſo proceſs of outlawry.

By

By this it appears that whenever the defendant hath day in court by the writ, there the plaintiff is demandable under peril of a nonſuit; and the reaſon is, that when the plaintiff brings in the defendant, he ought to attend himſelf; and when the defendant is brought into the court below, and removes the plea into the court above, he thereby gives himſelf and the plaintiff a day in the court above, and the plaintiff, having put in pledges of proſecution, ought to follow the writ; ſo that wherever day is given, there the defendant may demand the plaintiff, under peril of a nonſuit. But where day is given to the defendant by the writ, there no judgment can be given againſt him till he appears, for that would be to give judgment *parte inauditâ*; and therefore though he himſelf removes the plaint by *recordari*, whereby he gives himſelf a day in the ſuperior court, yet if he do not appear at the day, they muſt carry on the proceſs to make him appear, though he has appeared in the court below, ſince ſuch appearance does not give authority to the court above to proceed, unleſs he has firſt appeared there. But there is judgment of nonſuit againſt the plaintiff if he does not appear, for his non-appearance is not proſecuting his plaint, which is a nonſuit.

Pone (at the ſuit of the defendant) *loquelam quæ eſt in comitatu tuo, inter* A. *&* B. *de averiis ipſius captis, &c.* and ſays *præfato* B. where it ſhould be *præfato* A. The plaintiff's counſel prayed damages, for that otherwiſe the plaintiff had no remedy; for the

3 H. 6. 2. F. N. B. 69. M. *Note.*

pone

12 H. 4. 14.
5 H. 6. 2.
4 Inſt. 266

pone is abated, and ſo the court is without warrant: yet it ſhall not be remanded, for the county court and the courts above are the courts of the king; and a new *pone* doth not lie, becauſe the plaint is here. On the other hand it was ſaid, that a *pone* or *recordari* is but to remove the plaint, ſo that when the plaint is removed, the *pone* or *recordari* ſhall never abate, for that the court is poſſeſſed of the plaint; but yet the plaintiff hath not a day in court, becauſe ſuch writ, not being good, cannot give the plaintiff or defendant a day; therefore the court may make a ſpecial writ to the ſheriff to warn the plaintiff to purſue the plaint; and ſo it was done in this caſe.

F. N. B. 69. M. *Note.*
1 R. 3. 4.
7 E. 4. 23.

6 E. 3. 55.
8 E. 3. 71.
Cro. El. 543.
Moor 30.
contra.

The plaint is well removed, although the *pone* bear date before the plaint entered. So if the plaint be removed by *certiorari*, where it ought to be by *pone* or *recordari*. So if one plaint be removed where another ought to have been. Or where there is a variance between the plaint and the writ.

II. Of the writ of *Recordari*.

F. N. B. 70. B.

When the plaint is in the county, and the replevin ſued there without writ, then if the plaintiff or defendant will remove it, he ought to ſue a writ of *recordari*, out of the chancery, directed unto the ſheriff; and the writ ſhall be ſuch:

"*Rex vic' Linc' ſalutem. Præcipimus tibi, quod in pleno com' tuo recordari facias loquelam quæ eſt in eodem com' ſine brevi noſtro, inter* A. & B. *de averiis ipſius* A. *captis & injuſtè detentis,*

tentis, ut dicitur, & recordum illud habeas coram juſticiariis noſtris apud Weſt.' (tali die) &c. ſub ſigillo tuo & ſigillis quatuor legalium militum ejuſd' com' ex illis qui record. ill. interfuerunt; & partibus eundem diem prefigas, quod tunc ſint ibi, in loquela illâ, prout juſtum fuerit proceſſuri; & habeas ibi nomina præd' quatuor militum, & hoc breve. Teſte, &c. Fiat executio iſtius brevis, ſi præd. A. hoc petat, & aliter non."—"*George* the Third, *&c.* To the ſheriff of, *&c.* greeting: We command you that you cauſe to be recorded in your full county the plaint which is in the ſame county, without our writ, between *A.* and *B.* of the beaſts of the ſaid *A.* taken and unjuſtly detained, as is ſaid, and have that record before our juſtices at *Weſtminſter* (ſuch a day, *&c.*) under your ſeal and the ſeals of four lawful knights of the ſame county of thoſe who were preſent at the recording it, and prefix the ſame day to the parties that they be then there, to proceed in that plaint according to juſtice, and have there the names of the ſaid four knights and this writ. Witneſs, *&c.* Let this writ be executed if the aforeſaid *A.* requires it, and otherwiſe not."

The words *ut dicitur* are only inſerted when the writ is brought by a common perſon, and not when it is brought by the king. 38 Ed. 3. 31.

And by this writ it appeareth that the plaintiff may remove the plaint by *recordari*, without any cauſe put in the writ; but the defendant cannot remove the plaint without F. N. B. 70. B.

ſhewing

ſhewing cauſe in the writ, as is before ſaid upon the *pone*. And the cauſes for the defendant ought to be ſuch.

"*Quia præd'* B. *placitando in com' præd. aſſerit ſe averia præd' cepiſſe in ſeparali ſolo ſuo, ut in damno ſuo ibidem, in quo quidem ſolo præd'* A. *clamat communiam paſturæ, ut dicitur; quæ quidem loquela, eo quod tangit liberum tenementum (ut prædictum eſt) in eodem com' ſecundum legem & conſuetudinem regni noſtri ſine brevi noſtro placitari non debet. Fiat executio iſtius brevis (ſi cauſa ſit vera) & præd.* B. *hoc petat, & aliter non.*" —"Becauſe the aforeſaid *B.* in pleading in the county aforeſaid, aſſerts that he took in his ſeparate ſoil the beaſts aforeſaid, as in his damage there, in which ſoil the aforeſaid *A.* claims common of paſture, as is ſaid, which plaint inaſmuch as it concerns the freehold (as is aforeſaid) ſhould not be pleaded in the ſame county, according to the law and cuſtom of our realm, without our writ. Let this writ be executed (if the cauſe be true) and the aforeſaid *B.* requires it, and otherwiſe not."

12 H. 4. 17. Mich. 50 Ed. 3. 12. Fitz. *Abr. tit. Cauſe de remover plea*, pl. 10. F. N. B. 70. B. *Note.*

If the plea be removed out of the court of the lord, (in ancient demeſne, *ut videtur*) the cauſe is traverſable; *contra*, if out of the court of the king. And if the cauſe be inſufficient, or none at all, yet the parol ſhall not be remanded; otherwiſe if in ancient demeſne; for, upon a *recordari* out of ancient demeſne, the plea is wholly upon the cauſe, and therefore the plaintiff may be nonſuit in ſuch *recordari*; but if it be out of any

any other court, the plea is upon the mere matter, and therefore the plaintiff cannot be nonſuit upon the *recordari*, but it muſt be in the action; the reaſon is, becauſe ancient demeſne is a privilege going with the ſoil (ſuch manors being anciently compoſed of the king's huſbandmen), and the pleas cannot thence be removed without cauſe, becauſe it would alter the condition of the ſoil, to be impleaded in the king's courts, without ſuch real cauſe made out.

Beaſts were taken in *D.* in the county of *Wilts*, (which was within the precincts of the honour of *Wallingford* in the county of *Berks*), and were driven into the county of *Berks*, (where the caſtle and court of the honour of *Wallingford* was) and there the plaintiff had deliverance without writ; the defendant ſued a *recordari* to the ſheriff of *Berks*, *quia diſtrixit in feodo*, and the plaintiff came, but the defendant made default; and it was adjudged: 1. That the parol was well removed, notwithſtanding the taking was in another county. 2. That proceſs of outlawry did not lie here without a default of the defendant, as it does in replevin. 3. That yet if he came in by proceſs of outlawry, he ſhould be put to anſwer. 4. That he might avow *damage feaſant*, notwithſtanding this ſpecial cauſe aſſigned. 20 Ed. 3. 218. Dyer 168.

And if a replevin be ſued by plaint, in the court of any other lord, than in the county court before the ſheriff, then the *recordari*, which is ſued by the plaintiff or defendant, ſhall F. N. B. 70. B.

ſhall be directed unto the ſheriff; and the writ ſhall be thus:

"*Rex vic' Linc' ſalutem. Præcipimus tibi quod aſſumptis tecum quatuor diſcretis & legalibus militibus de com' tuo in propriâ perſonâ tuâ accedas ad curiam* W. *de* C. *& in illâ plenâ curiâ recordari facias loquelam quæ eſt in eâdem curiâ ſine brevi noſtro, &c. et recordum illud habeas ſub ſigillo tuo & ſigillis quatuor legalium hominum ejuſdem curiæ qui record. ill. interfuerint, & partibus, &c.* (*ut ſupra*) *quia præd.* A. *eſt ballivus præd.* W. *de* C. *curiæ ſuæ præd. & tenet placita ejuſdem curiæ, & judex in ſuâ cauſa eſſe non debet.*"—"*George* the Third, *&c.* To the ſheriff of, *&c.* greeting: We command you that you take with you four diſcreet and lawful knights of your county, and go in your own proper perſon to the court of *W.* of *C.* and in that full court cauſe to be recorded the plaint which is in the ſame court, without our writ, *&c.* and have that record under your ſeal and the ſeals of four lawful men of the ſame court, who were preſent at the recording it, and to the parties, *&c.* (as above) becauſe the aforeſaid *A.* is bailiff of the aforeſaid *W.* of *C.* of his court aforeſaid, and holds the pleas of the ſame court, and ought not to be judge in his own cauſe."

[Note, this writ is ſometimes called a *recordari facias loquelam*, and ſometimes an *accedas ad curiam.*]

If

If the plea be diſcontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench by *recordari*, and it ſhall be good, and the plaintiff ſhall declare upon the ſame; and the court ſhall hold plea upon the ſame plaint: and therefore if the defendant be without addition in the plaint, he ſhall not have addition in the *recordari*, although proceſs of outlawry lie thereon. For the plea is not held on a writ, but a plaint only, and ſo not within the intent of the ſtat. of 1 *H.* 5. *c.* 5. which ſpeaks only of writs original, *&c.*

F. N. B. 71. a.

2 H. 5. 6.
3 H. 6. 30.
F. N. B. 71. A. Note.

And if the plaint be continued, and iſſue joined, in the county court, yet nothing ſhall be removed but the plaint; and therefore in the court above, the plaintiff is to declare *de novo*. The reaſon is, that the *pone* and *recordari* give the defendant a day in the court above; and when at common law the plaintiff and defendant appeared at the day, the plaintiff counted and declared, and the defendant avowed *ore tenus*, that the court might know the cauſe of complaint; and being in a new court, it was all to be rehearſed, in order that they might underſtand it. And this the rather, becauſe, being a ſuperior court, they were not bound by any deciſion made on the proceedings below. This could be no inconvenience in replevin at common law, where the plaintiff might bring his replevin *toties quoties*; and where when the defendant removed it, and gave another day, it was upon cauſe ſhewn of inability or partiality in the courts below.

[But yet, to ſome purpoſes, the Court are made judges of the whole proceedings, on the removal of the plaint by *recordari*; and therefore, if a *withernam* be awarded in the court below, the plaintiff ſhall gage deliverance in the court above. 21 *H.* 6. 40.]

And not only on a *pone* or *recordari* is the court to take no notice of any pleadings or proceedings but what are rehearſed or recorded before them; but even on a *habeas corpus*, which is a writ of liberty, the plaintiff muſt follow the body of the priſoner, and declare againſt him *de novo*; for the court cannot take notice of the pleadings rehearſed before inferior judges, which do not come up before them, but by writ of falſe judgment, where the court is not of record;—or by writ of error, where it is;—and therefore they have nothing to do with their proceedings until judgment is given.

But where they have the body of the defendant, the plaintiff may proceed originally againſt him. So in *pone*, where they have the original writ, they may proceed originally upon it. And the *recordari* makes the plaint of record; for the ſtatute of *Marlbr'* which gives the plaint provides, in the firſt chapter, that all complaints of diſtreſſes ſhall come into the courts of the king; which gives the king's courts authority to record ſuch plaint as was in the county. The words are, *Et præterea, quidam eorum ſe per miniſtros domini regis juſticiari non permittant, nec ſuſtineant quod per ipſos liberentur diſtrictiones, quas authori-*

authoritate propriâ fecerint ad voluntatem ſuam; proviſum eſt, concordatum et conceſſum quod tam majores quam minores juſticiam habeant & recipiant in curia domini regis, & nullus de cætero ultiones aut diſtrictiones faciat per voluntatem ſuam abſq'; conſideratione curiæ domini, ſi forte damnum vel injuria ſibi fiat unde amendas habere voluerit de aliquo vicino ſuo, ſive majore ſive minore.

By this ſtatute it appears, that the plaint, though given for expedition before the ſheriff, may at any time be removed and recorded in the court of the king. [It has even been adjudged, that the delivery of a *recordari* to the clerk of a county court, after an interlocutory and before final judgment, is a ſtay of all further proceedings in that court. 2 *Bur.* 1151.

And when the plaint is removed by *recordari*, the court above will award a *capias* on the defendant's default, though no ſuch proceſs could have iſſued in the court below. 3 *H.* 6. 55. But it is otherwiſe of a *juſticies*, for on that no *capias* lies, even in the court above. 4 *Inſt.* 266.]

In a *recordari* to remove a record out of ancient demeſne, the writ ſhall ſay *loquelam et proceſſum*, and not *recordum*; yet the form of the regiſter in the *recordari*, as before ſaid, is *et recordum illud habeas.* 36 H. 6. F. N. B. 70. B.

In the ſheriff or lord's court, and in ancient demeſne, in all replevins, the plaint is called *loquela*, becauſe it is not a record, as

it is in their court; but in the *accedas ad curiam*, the tranſmiſſion of the plaint by the king's writ, under the ſeals of four of the ſuitors, in the preſence of the ſheriff and four knights, is called *a record*, becauſe it is ſent to be a record in the courts above.

9 H. 6. 58. 34 H. 6. 42. *contra.* F. N. B. 71. C.

Where by *recordari* the record was removed by the ſheriff out of the court of chancery at *Canterbury*, it was ſaid, that the court of *Canterbury* might have refuſed to obey the writ; for being a court of record by commiſſion, the plea ought not to be removed by *recordari*, but by *habeas corpus cum cauſa*, or *certiorari*. And it was held, that inaſmuch as the plea was come hither without warrant, all was void, and that therefore the court could not remand it, for the record remained at *Canterbury*; and if no proceeding there according to the ſuit of that court, it was diſcontinued. Yet in the regiſter there is a *recordari* on a foreign voucher out of *Cheſter*.

Reg. 6, 7.

The reaſon is, becauſe the *recordari* is to return a *loquela*, and when the proceedings are in a court of record, it is not a *loquela*, but a RECORD in its own nature in the court below.—Again, the *recordari* ſuppoſes a partiality in the court below, which cannot be ſuppoſed in a court of record, acting under the king's commiſſion. Nor have the ſuperior courts any inherent right, to judge of what any other inferior court of the king is poſſeſſed of, until it comes before them by *habeas corpus cum cauſa*, or by *certiorari*.

The *habeas corpus* is the WRIT OF LIBERTY; and the law hath that tenderneſs for the liberty of a man, that when any perſon is impriſoned, he may purchaſe that writ to any ſuperior court; and if any of theſe courts ſee cauſe on the return to diſcharge him, he ſhall be freed. Hence it is, that the body muſt be ſent, and the cauſe of impriſonment muſt be ſent with it.

A *certiorari* is to return the proceedings on another ground. All inferior courts are of definite and bounded authority, and cannot award execution out of the diſtrict; therefore, leſt juſtice ſhould fail, proceſs of *certiorari* goes to remove the record into the upper courts. And both theſe ways have been uſed to give juriſdiction to the upper courts.

The *certiorari* coming to remove a record on ſuppoſition that inferior juriſdictions may exceed their bounds, they muſt ſend the record in the condition it was when the *certiorari* came to them; but it ſtops their proceedings, from the time they receive it.

If a record be removed out of a court of record by *recordari*, it cometh in without warrant, and the court ſhall not hold plea thereof. But if a record cometh in court without a warrant, the party may ſue a writ directed unto the juſtices, that they may proceed upon that record *quod coram vobis reſidet*. F. N. B. 71. a.

The meaning of the diſtinction is this, that when a *recordari* is ſent down to a court of

record to remove a replevin there depending, they may proceed and not obey the writ; becauſe that replevin is of record in the king's court, and conſequently *in curia regia* according to the ſtatute: and therefore the writ to make it a record is *actum agere*. But if they do obey the writ, and ſend the record, they cannot afterwards proceed upon it, becauſe they have ſent it away from them: and the court above cannot proceed upon records of another court, as they do in replevin on the plaint ſent before them by *recordari*; and therefore there muſt be a writ to give them authority to proceed on the record *quod coram vobis reſidet*. But they have an inherent authority to ſee that other juriſdictions do not exceed their limits; and therefore, when they ſend a *certiorari* to remove ſuch record, they ought to proceed above on the plaint entered in the county. [If the *recordari facias* bear date before the plaint was entered in the county,] yet the record is well removed, becauſe both courts are the courts of the king. But if the record be removed out of the court of any other lord by ſuch writ, which beareth date before the plaint, it is not good. The reaſon is, becauſe the ſheriff's county being held or farmed from the king, as immediate deputy, the king may remove the replevin out of the ſheriff's court into his own, without any cauſe ſhewn; and therefore it is not material whether the *recordari* be teſted before the plaint or not: and although the defendant cannot remove the plaint without cauſe, yet this is not to prevent the ſheriff from being ouſted of his juriſdiction, but that the plaintiff may not be delayed without good cauſe ſhewn.—But where

F. N. B. 71. D.

where the record is removed out of the lord's court, which has a juriſdiction by grant or preſcription, there muſt be cauſe ſhewn for ſuch removal; and ſuch cauſe will be abſurd if the *accedas ad curiam* bears date before the plaint; for that cannot be a cauſe to ouſt the lord of juriſdiction, which was not in being at the time of the writ iſſuing.

VII. Of *replevin* itſelf, and herein are to be conſidered,

1. For whom, and in what caſes it lies.

2. The declaration in replevin.

3. The ſeveral pleas in this action; and herein of the avowry,

4. Of the judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and of the writ of ſecond deliverance.

1. For whom and in what caſes it lies.

The replevin lies as well for goods in which I have only a qualified property, as for thoſe in which I have the abſolute property. As if goods be in my hands, in order to be delivered over to *J. S.*—and *J. N.* takes them from me, I may have a replevin againſt *J. N.* to bring back theſe goods into my own poſſeſſion; becauſe I have a right to the poſſeſſion of theſe againſt every body but *J. S.* and therefore as *J. N.* is a treſpaſſer for violating that poſſeſſion, ſo I may qualify

Bro. Abr. tit. Repl. pl. 29. 2 Ro. Abr. 430. Bro. tit. Repl. pl. 8. Doct. Plac. 314.

that tort he hath done, by bringing the replevin which complains of the unjuſt taking; and that *J. N.* detains them *contra vadios & plegios.*

So it is if cattle be farmed to me to manure my land; if they be taken out of my cuſtody, I may bring replevin for them; becauſe during the term I ought to have the uſe of them: and therefore the caption and detention of them, by any perſon, is unlawful, which is the injury complained of in the replevin; or I may have in this caſe a ſpecial replevin, ſetting forth my ſpecial property.

2 Ro. Abr. 431. If *A.* takes my goods by the command of *B.* I may take the replevin againſt both; becauſe in treſpaſs both are principals, and equally guilty of the unjuſt caption and unjuſt detention.

2 Ro. Abr. 430. 1 H. 4. 18. Bro. Abr. tit. Replev. pl. 14. 54. 9 Co. 22. b. 23. a. If the lord diſtrains the beaſts of the tenant, and the meſne puts his own beaſts in the pound in lieu of the tenant's, the meſne may afterwards have a replevin for his own beaſts, and the lord cannot plead that the beaſts of the tenant, and not of the meſne, who is the plaintiff in replevin, were taken: becauſe, the tenant having paid his rent to the meſne, the meſne is thereby obliged to defend the tenant from the lord's diſtreſs. But this cannot be done unleſs the meſne becomes party to the ſuit, and be ſubſtituted in the place of the tenant.

By this means, the meſne may ſhew the ſervices performed to the lord, for which the diſtreſs

diſtreſs was taken; and conſequently that the tenant ought not to be diſturbed. Hence it is, that the writ of meſne is allowed to the tenant, to bring in the meſne if he does not come in of himſelf; becauſe the tenant being a ſtranger to the tranſactions between the lord and the meſne, he cannot defend himſelf againſt the lord but by the meſne; and therefore, where the meſne is to take the defence, it is but fit he ſhould be allowed to pledge his own cattle, and diſcharge his tenants. And the lord hath no prejudice, becauſe there is ſtill a good pledge to anſwer his ſervices if there be any due. So and for the ſame reaſon it is, if my leſſor diſtrains my tenant, I may put my beaſts in the pound in lieu of my tenant's, and then replevy them, as if they had been originally taken.

Several perſons cannot join in one replevin for ſeveral chattels, where the property of them is ſeveral; becauſe, where ſeveral diſtreſſes are taken by the ſame perſon of different men, each hath a ſeveral and particular injury done him, if the diſtreſſes be unlawful; and therefore they cannot jointly complain of an unjuſt caption and detention, where the property is ſeveral (*a*). For what reaſon have I to complain or to ſeek redreſs in my own name, for an injury ſuppoſed to be done to another?

3 H. 4. 16. Bro. Abr. tit. Repl. pl. 12. Doct. Plac. 315. Co. Lit. 145.

If beaſts which are *feræ naturæ* be reclaimed by me, and are reſtrained or taken out of

2 Ro. Abr. 430. Bro. Abr. tit. Repl. pl. 64. Doct. Plac. 314.

(*a*) But in favour of liberty the law permits two to join in ſuing the writ De homine replegiando. F. N. B. 66. F. cit. Co. Litt. 145. b. 13th edition.

my

my cuſtody, I may have a replevin for them; becauſe I have a property in them while they continue with me. But this property only remains while they are in my poſſeſſion, or retain the *animum revertendi*; and therefore if they leave me of themſelves, and another takes them while they are out of my poſſeſſion, and they have not the *animum revertendi*, I cannot have a replevin for them; becauſe, in ſuch caſe, I have no property in them.

Lev. Ent. 152. Lutw. 1191. Raſt. Entr. 275. Bro. Abr. tit. Repl. pl. 22.

If a ſuperior juriſdiction award an execution, it ſeems that no replevin lies for the goods taken by the ſheriff by virtue of the execution; and if any perſon ſhould pretend to take out a replevin, and execute it, the court of juſtice would commit them for a contempt of their juriſdiction, becauſe by every execution the goods are in the cuſtody of the law; and the law ought to guard them: and it would be troubling the execution awarded, if the party on whom the money was to be levied, ſhould fetch back the goods by a replevin. And therefore they conſtrue ſuch endeavours, to be a contempt of their juriſdiction, and upon that account commit the offender. But if any INFERIOR juriſdiction iſſues an execution, a replevin will lie for the goods taken by that execution; becauſe the inferior juriſdiction being reſtrained within particular limits, the officer who took the goods, is obliged to ſhew that he took the goods within thoſe limits, and that the inferior court which iſſued the execution did not exceed their authority in iſſuing it.

Milward v. Caffin, Bl. 1330.

"When juſtices exceed the ſpecial juriſdiction given to them by a particular ſtatute, the

the goods which have been diſtrained in conſequence of ſuch exceſs of juriſdiction may be replevied, and that too although the court of appeal has confirmed their warrant. As where a diſtreſs was taken for a poor's rate for lands not in the occupation of the plaintiff, notwithſtanding the Seſſions on appeal had confirmed the rate, the Court held that the diſtreſs was repleviſable, becauſe the determining that a man may be aſſeſſed for what he does not occupy, was an exceſs of the juriſdiction given by 43 *Eliz.* *c.* 2. and 17 *G.* 2. *c.* 38."

Beſides, an inferior court of record cannot commit for contempt out of the court. Hence it is, that the officer of an inferior court, is to ſhew by what authority he took the goods. Thus, in a replevin, the defendant was put to juſtify, by a condemnation before a juſtice of peace, for not entering ſtrong waters, and a warrant on that for levying 20*s.* fine on the plaintiff. [But, in a ſubſequent caſe, the Court granted an attachment againſt the under-ſheriff, for granting a replevin of goods, diſtrained on a conviction for deer ſtealing, *Str.* 1184.]

3 Lev. 204. Ayleſbury v. Harvy.

A replevin doth not lie againſt the king, where the king is party, nor where the taking is in right of the king; and if ſuch replevin ſhould he granted, the ſheriff ought to forbear to execute it, when he is informed the king is party; becauſe all the king's debts are of record,—he taking nothing but by matter of record; and therefore the cattle are ſeized for the king's debts by the *levari facias*,

3 H. 7. 1. Bro. Abr. tit. Repl. pl. 33. Vide ibid. pl. 51. contr.

facias, which is a writ of execution, and conſequently no replevin lies againſt the king, any more than it does for goods taken in execution at the ſuit of common perſons.

Bro. Abr. tit. Repl. pl. 56. Sid. 80. Arundel v. Trevyl. Raſt. Ent. 560, 56 • F. N. B. 69. K.

Executors ſhall have replevin for the goods of the teſtator taken in his life-time, becauſe the general property is in the executors, and the poſſeſſion ought to follow that; and therefore the executor may recover the poſſeſſion by this writ of replevin.

If the goods of a feme ſole be taken and ſhe marries, the huſband alone may ſue the replevin, becauſe the property is transferred by the marriage, and veſted abſolutely in the huſband, ſo that he may releaſe it; and conſequently he may have an action in his own name to bring back the property.

Bro. Abr. tit. Repl. pl. 41. Sid. 82.

In replevin for a ſow and pigs, the defendant, as to the ſow avows *damage feaſant*, and for the pigs pleads *non cepit*. The jury found for the defendant, as to the ſow; and for the pigs, they found that the ſow farrowed them after ſhe was diſtrained, and in the poſſeſſion of the defendant. The plaintiff had damages for the pigs on this plea of *non cepit*; becauſe the pigs were taken by the defendant as well as the ſow, though they were not *damage feaſant*; and therefore the defendant ſhould have ſet forth the ſpecial matter as to the pigs.

Bro. Abr. tit. Repl. pl. 34.

No replevin lies for charters relating to the inheritance, becauſe the charters are reckoned part thereof, and as ſuch deſcend with

with it to the heir; and not being eſteemed in law chattels, are not by law repleviſable.

A replevin doth not lie for goods taken in foreign parts, though afterwards brought into the realm; becauſe ſuch a foreign caption might have been juſtifiable according to the law and cuſtom of the place where it was made, though it may be illegal by our law: and therefore ſuch caption ought not to be tried here. 2 Show. 91. Nightingale v. Adams.

If beaſts be taken in one county and carried into another, the plaintiff may have his replevin in either county; becauſe it is a caption in every county where they are taken by the defendant. F. N. B. 69. I. Doct. Plac. 315.

This writ of replevin is always executed by the ſheriff, even in his own caſe, where he diſtrains the goods of another, becauſe this writ is a *juſticies* to the ſheriff, on which he is to hold plea in his county court; and therefore no other can intermeddle in the execution thereof but the ſheriff, who is to preſide over the ſuitors, as judge therein. Regr. 81. b. Bro. Abr. tit. Repl. pl. 65.

2. Of the declaration in replevin.

And this is little more than a tranſcript or recital of the writ itſelf. But in the declaration you muſt not only alledge that the defendant took the beaſts at ſuch a place, but alſo you muſt alledge the *locus in quo*, as *in quodam loco ibidem vocato, &c.* for it is not enough to alledge ſuch a place from whence the *venue* may come; but the place muſt be ſo Hob. 16. Moor 678. 2 Mod. 199. Doct. Plac. 315. Bro. Abr. tit. Repl. pl. 47. 2 H. 6. 14. Cro. Eliz. 896. Ward v. Savil. Barn. 353.

ſo PARTICULARLY ſpecified, as to give the avowant an opportunity to ſhew that he had a right to take the goods, in that PARTICULAR place; becauſe the right of the caption may turn on the place; and in this action, the freehold may come in diſpute. And therefore it is neceſſary to ſpecify the place particularly, wherein the beaſts were taken which is equivalent to the new aſſignment in treſpaſs. If the *locus in quo* be not particularly ſpecified in the count, the defendant may demur SPECIALLY, and ſhew it for cauſe; for the defendant may juſtify the taking in that particular place, for cauſes he could not have any where elſe. But if the defendant ſhould plead *non cepit*, the count would be good, becauſe then the place cannot be material when the defendant denies the taking.

Walton v. Kerſop, M. 8 Geo. 3. 2 Wilſ. 354.

"Where the plaintiff declared for taking his cattle at *Market Street*, and the defendant pleaded *non cepit modo et formâ*, and proved the original taking at *Hardhall*, upon proof by the plaintiff that the cattle were in the defendant's cuſtody at *Market Street*.—Mr. J. *Gould* at the trial and afterwards upon the point reſerved, the whole Court were of opinion that the plaintiff ought to have judgment, becauſe if the defendant took them wrongfully at firſt, the wrong was continued to any place where the defendant had them in his cuſtody, and conſequently that the place was well laid in the declaration."

Lutw. 1221. Ld. Raym. 332.

"If the taking is in a common field, it is not neceſſary for the plaintiff in his declaration to

to ſhew the quantity of acres of which he is ſeiſed therein, or to ſpecify the *locus in quo* any farther than by alledging the name of the common field *generally*, becauſe perhaps the very ſpot of ground where the taking was, may have no name, therefore it is ſufficient for him to ſhew the name of the whole, as he cannot diſtinguiſh it into parts."

"The declaration ought to be certain and particular in ſetting forth the number and kinds of cattle or things diſtrained, becauſe otherwiſe the ſheriff cannot tell how to make deliverance if it ſhould be neceſſary; but it ſeems that its being certain to a general intent is ſufficient, eſpecially if it be after verdict; and tho' an uncertain deſcription would be ill on demurrer, yet an avowry may cure that defect, both parties agreeing what the *quantum* and the nature of the goods are; thus where the declaration was for taking fourteen ſkimmers and ladles, and three large pots and covers, the objection that the plaintiff had not diſtinguiſhed in his count how many ſkimmers and how many ladles, was over-ruled."

Aleyn. 33. Style 71. 7 Co. 25. Show. 170. Kempſton v. Nelſon, Tr. 1 G. 1. B. R. 4 Bac. Abr. 387. Str. 1015.

"But in ſuch caſe the ſheriff may require the defendant *to ſhew him the goods*. And it would be a good return to ſay, *nullus venit ex parte defendentis ad oſtendendum bona et catalla*."

Bull. N. P. 53.

"The declaration muſt be ſeveral by every one, who has ſeveral property: tho' a man may count of ſeveral takings, part at one day

Co. Litt. 145. b. F. N. B. 68. 18 Vin. Abr. 579.

day and place, and part at another day and place, in the ſame declaration."

Bro. Baron and Feme, 85.

"But baron and feme may be joined in the ſame declaration for goods diſtrained from the feme *dum ſola*; or the baron may bring the replevin alone."

Ibid.

"So they may be joined for goods which the wife had as executrix, tho' they were diſtrained during the coverture."

Bern & ux. Caſ. tem. Hardw. 119. E. 8 G. 2.

"Where they are joined in the ſame declaration againſt a defendant for taking the goods of the huſband and wife, if the defendant avows, it ſhall be intended that the taking was before the coverture, and that they had then a joint property: and in that caſe the taking muſt be laid to be to the damage of both, becauſe the damage ſurvives to the wife."

2 Lutw. 1150. Petree v. Duke, F. N. B. 69. L. Co. Ent. 610, 611.

The writ of replevin is *quod cepit averia & injuſte detinet contra vadios & plegios*; to which writ the ſheriff returns *replegiari feci*. There you go on in the replevin only for damages for the caption, and then in the count you recite the writ in the *detinuit*, and count in the *detinuit* for damages;—and though the writ be taken out in the *detinet*, yet when the ſheriff hath returned *replegiari feci* upon it, that return is a warrant to recite the writ in the *detinuit*; for if the writ was recited in the *detinet*, and the count was in the *detinuit*, it would be a variance for which the judgment may be arreſted, or the defendant might

might have demurred. But where the ſheriff does not replevy the beaſts, there you muſt recite the writ in the *detinet*, and count in the *detinet* alſo (*a*) becauſe the beaſts are not delivered; and there you recover as well the value of the beaſts in damages, as damages for the detention. And this is a ſhorter way than to ſue a *withernam* and *cap.* for a return of the beaſts.

"Becauſe if the defendant before the return of the *withernam* appears to the writ of replevin, and offers to plead *non cepit*, it ſhall ſtay the *withernam.*" Bull. Ni. Pri. 52. 5th edit.

3. Of the ſeveral pleas to this *action*, and theſe are of four ſorts. Pleas in abatement, The general iſſue, *non cepit*. The juſtification; and this of two ſorts, either diſ-affirming property in the plaintiff, or admitting it. The avowry.

As to pleas in abatement. There is a difference between pleas in abatement of the writ in replevin, and in other actions; for in other actions the pleas in abatement go merely to the form of the writ; becauſe other actions are for debt or damages, in which the plaintiff hath no poſſeſſion of the thing itſelf until judgment and execution, and therefore the pleas in abatement are to the form of that writ only, and all pleas to the right are in bar of it: but in replevin, the deliverance

(*a*) However, of late years, no action has been brought in the *detinet*, tho' there is much curious learning in the old books concerning it. Bull. Ni. Pri. 52. 5th edition.

of the goods is immediate, ſo that the plaintiff hath the poſſeſſion before the defendant can plead thereunto; and therefore, according to the genius of this action, pleas that are in abatement, muſt give the defendant a TITLE to the return of the beaſts. For it is not enough merely to quaſh the writ, as in other caſes, where the defendant is *in ſtatu quo* when the writ is quaſhed;—but in this action, that the defendant may be *in ſtatu quo*, he muſt not only ſhew that the writ ought to be quaſhed, but that he ought to have a return of the beaſts himſelf. And here, the pleas in abatement, differ from the pleas in bar only in this; that in abatement they do not avow or acknowledge the caption and detention, which is the giſt of the action; but they muſt go ſo far as to entitle the defendant to a delivery, or elſe they do not take away the force and effect of the writ of replevin, which is always executed by the delivery.

1 Vent. 249.
6 Mod. 81.

Therefore in this action the defendant may plead PROPERTY in himſelf in abatement; for by ſuch plea he doth not deny, or confeſs, and avoid the caption, and therefore it is not a bar; but only ſhews that the plaintiff hath not a right to a deliverance; and by ſhewing that, the goods ought to be returned to the defendant on ſuch abatement, as they were before the writ was taken out. But *quære*, for it ſeems by the later authorities, that it ſhould be pleaded in bar.

Cro. Jac. 519.
3 Keb. 232.
1 Vent. 249.
6 Mod. 81.

[It is to be obſerved that theſe *later authorities* are not pointed out, and the editor, after

ter a diligent ſearch, hath not been able to find them. There are indeed caſes, in which the courts have determined, that property in the defendant MAY be pleaded IN BAR, but none that EXCLUDE the defendant from pleading it *in* ABATEMENT: on the contrary, the caſes cited in the margin moſt clearly convey the idea, that *the defendant in replevin may plead property, whether it be in himſelf or a ſtranger, either in abatement* OR IN BAR, *according to his election.*]

If the defendant pleads property in *J. S.* a ſtranger, he may plead it in abatement,—and becauſe he ſhews that there is no property in the plaintiff, and by conſequence that he had no right to a deliverance by this writ, he ought to have a return without making any conuſance.

2 Lev. 92. Salk. 94. Ld. Raym. 984. S. C. Salk. 94. Carth. 243. S. C. 6 Mod. 81.

If the defendant pleads property in the plaintiff and *J. S.*—there the plea is in abatement of the replevin, as it is in other actions; for though it admits a right of deliverance in the plaintiff, yet it does not allow it by a writ under the preſent form; but gives a better writ to be brought by the plaintiff and *J. S.*—But here the defendant ought to make a conuſance; becauſe, this plea not diſ-affirming the property, it leaves a right in the plaintiff to have his beaſts, without ſuch conuſance be made.

As a man may plead in abatement of the writ, ſo he may of the count; and by abating the count he doth in conſequence abate the writ; and there it is pleaded *ad narra-*

Raſt. Ent. 554.

tionem & breve: for if a man doth not purſue his writ by a regular count, his writ in conſequence is abated. And therefore if a man declare of a caption in *Blackacre*, and the defendant pleads in abatement of the count, that he took them in *Whiteacre*, *abſq; hoc* that he took them in *Blackacre*, this will abate the count, under THAT form. But then he muſt go over and make conuſance; becauſe, not diſ-affirming the plaintiff's title to the beaſts, he leaves the plaintiff a right to retain. But this conuſance is not traverſable where it is pleaded in abatement; becauſe the plaintiff muſt maintain the form of his own count without falling on the title of the defendant; and if the plaintiff ſhould join iſſue on the traverſe in the plea of abatement, and traverſe the conuſance alſo, it would be double; which would be bad upon ſpecial demurrer; and if the plaintiff traverſed the conuſance only, it would be a diſcontinuance of the plea in abatement.

Cro. Eliz. 372
Mod. Caſes 103.
Bro. Abr. tit. Repl. pl. 31. 43.
Vent. 127.
Salk. 93.
Carth. 139.
Ld. Raym. 1017.

But if a juſtification for *damage feaſant* had been pleaded in bar, there the caption and detention, according to the form of the writ, is acknowledged. And therefore there the plaintiff may traverſe the title of the defendant; becauſe the defendant having acknowledged the caption and detention according to the form of the count, he hath put himſelf on the ſtrength of his own title. So in the caſe of time, if the plaintiff in his count lay the caption the 26th of *March*, and the defendant pleads in abatement, that he was poſſeſſed of the *locus in quo* by leaſe determinable the 25th of *March*, and that he took the

Doct. Plac. 316.

the beaſts the 24th of *March*, *damage feaſant*, *abſq;* *hoc* that he took them the 26th;—this is a good plea IN ABATEMENT only;—becauſe it goes only to the form of the plaintiff's count; for the time here becomes neceſſary to be laid in this action, becauſe the defendant may have a right to take at one time, and not at another. But in this and every other caſe in abatement, where the property is not diſ-affirmed to be in the plaintiff, the defendant muſt make conuſance of a juſt cauſe of return; for otherwiſe he doth not deſtroy the force and effect of the writ, by which the deliverance was made; but leaves the plaintiff a right to retain his own property.

Of the general Iſſue.

The general iſſue in replevin is *non cepit*. Here it is to be conſidered that the caption and detention is only in iſſue, and not the property; and in this, replevin differs from treſpaſs. For in treſpaſs where the general iſſue is *non culp.* the defendant may, on evidence, ſhew a property in himſelf, becauſe he cannot be guilty of treſpaſs in taking his own goods; but in replevin, upon *non cepit*, the property by the plea is admitted to be in the plaintiff, and therefore is not in queſtion at all; but whether the defendant took the goods mentioned in the declaration. And he cannot be admitted on the iſſue, to ſhew where the property was, becauſe he hath put it in iſſue only, before the jury, whether HE TOOK the beaſts or not, and not whoſe they were.

Bro. Abr tit. Repl. pl. 5. Vent. 249.

Johnſon v. Wollyer, at Guildhall, coram Pratt C J. H. 8 G. 2. Str. 507.

[In replevin for taking guns in *London*, the plaintiff proved a taking in *Surry*; upon which it was objected that the plaintiff had not proved his iſſue, for the place is material, and therefore part of the iſſue under the *modo et formâ*. The counſel for the plaintiff admitted that it was traverſable; but inſiſted that by not traverſing it particularly, the place was admitted, and could not be inſiſted on upon *non cepit*. But Chief Juſtice *Pratt* held, that where the plaintiff avows at a different place, in order to have a return, he muſt traverſe the place in the count, becauſe his avowry is inconſiſtent with it; but where he does not inſiſt upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. And therefore the plaintiff was nonſuit. But *quære* the legality of this deciſion] (*a*).

Sid. 81, 82. Arundel v. Frail

In replevin for a mare and colt, the defendant pleads *non eſt culpabilis de captione prædictâ infra ſex annos ultimos elapſos*. The plea was over-ruled, becauſe it gives no anſwer to the unjuſt detention, which the replevin complains of, as well as the caption; for the caption may be juſt, and the detention unlawful. As where the defendant eloigns the beaſts, or drives them to a caſtle, ſo that the ſheriff cannot replevy them at all, this is an unlawful detention, however juſt the caption might have been. And in the preſent caſe, it might be that

(*a*) In the caſe of Walton v. Kerſop, 2 Wilſ. 355. the Court ſeemed to have little reliance upon this caſe in Str. 507. And Wilmot Ch. J. of C. B. ſaid, "That it was *only* a deciſion at *Niſi Prius*."

the

the colt was foaled in the pound, and then was never taken by the defendant, yet it may be unlawfully detained; and though he might not have taken it within ſix years, yet he might have detained it until the day of purchaſing the writ, and that detention is complained of by the writ, and not barred by the ſtatute.

Of the Juſtification.

There is ſome difference between the avowry and the juſtification; for the juſtification confeſſes the caption and avoids the injuſtice of it: the avowry MAKES TITLE to ſuch caption of the property of another. The confeſſing and avoiding the caption may be *quoad* damages only; the avowry is always *pro retorno habendo.* 2 Jones 25.

1. Of juſtifications that diſ-affirm property in the plaintiff. As if the defendant acknowledges the caption and pleads property in himſelf; this is a good bar, becauſe it confeſſes the caption, which is the giſt of the action, but avoids the injuſtice thereof, by ſhewing that he had a right to take them; and this not only will abate the writ of the plaintiff whereby the deliverance was made, but alſo deſtroy all right of complaint for ſuch caption and detention; and therefore goes in bar of the action, and conſequently gives a return without conuſance *pro retorno habendo.* Vent. 249. Bro. Abr. tit. Repl. pl. 3. 6 Mod. 81.

2 Lev. 93. Salk. 5. 94. 6 Mod. 103.

If the defendant confeſſes the caption, and pleads property in *J. S.* this is in bar of the action, as well as in abatement of the writ; for this not only ſhews that the plaintiff had no right to a deliverance upon the writ, but alſo that he has no cauſe to complain of the caption and detention againſt his pledges, which is in bar of the action. And this is not only a juſtification to cover the defendant from damages, but for the return of the beaſts; becauſe he doth not admit property in the plaintiff, but diſ-affirms it; and therefore the beaſts ought to come back to the defendant, who ought to retain the beaſts againſt every one but *J. S.*

Ld. Raym. 217. Cro. Jac. 519.

2. As to juſtifications that affirm property in the plaintiff. Theſe cover the defendant from damages only, becauſe the plaintiff is intitled to his beaſts, as having property in them; and the defendant in ſuch pleas not making title to the beaſts as a pledge to anſwer any demand, he ought not to have the beaſts back, but may cover himſelf from the damages only for the caption.

Doct. Plac. 316. Ro. Abr. 319. Danv. Abr. 652.

Thus if the lord diſtrains for homage, and the tenant dies, and his executors ſue replevin. Here the defendant may juſtify and cover the damages, becauſe the diſtreſs was rightly taken at firſt, though by the death of his tenant he can no longer retain it as a pledge for his homage, and therefore cannot be entitled to a return; becauſe the homage was a ſervice to be performed by

by the tenant IN PERSON, and the diſtreſs being to compel him to it, cannot be detained longer than his life; therefore the lord muſt diſtrain the heir *de novo*.

Of Avowries, and the Pleas thereto.

Having thus conſidered the replevin and the writ that iſſues upon proper returns of the ſheriff, we come now to the avowry.

The avowry is the taking up the defence of ſuch diſtreſs. It acknowledges the diſtreſs taken, but avoids the injuſtice of the caption complained of, and ſets forth a good cauſe for taking ſuch diſtreſs, in order to have it returned again to the defendant. So that in replevin both parties are ARE ACTORS; —the plaintiff to have damages for the taking and detaining his goods,—and the avowant, to have return of the plaintiff's beaſts and damages.

Avowries are either for rents, ſervices, heriots, *&c.* or for *damage feaſant*; and here are to be conſidered.

I. What is ſubſtance, and what is form.

II. The ſeveral pleas to the avowries; and herein of the ſeveral traverſes and diſclaimer.

1. What is ſubſtance, and what form in avowries.

At

At common law the lord was obliged to avow upon his real tenant, which as the antient law ſtood was eaſily done, becauſe the tenant paid fines on every alienation, and the alienee was preſented by the next homage. But when theſe ſmall fines for alienation were not gathered, nor the courts regularly kept, the lords were at a loſs to find their real tenants, and conſequently to know whom to avow upon. To remedy this the *ſtat.* 21 *Hen.* 8. *c.* 19. *ſ.* 3. was made; by this the lord may diſtrain on the lands holden by him, and avow as in lands within his fee or ſeignory, alledging in the avowry, the lands to be holden of him, without naming any certain perſon or tenant.

9 Co. 22. a. Co. Lit. 268. b. Raſt. Ent. 156.

Upon this act it hath been held, that though the words are, that if the lord diſtrain on the lands holden of him, yet if the lord come to diſtrain, and the tenant drive the beaſts which were once IN VIEW of the lord, off the land, or out of the ſeignory, and the lord purſues and diſtrains them out of his fee, yet he may avow upon this act;—becauſe the diſtreſs, in conſtruction of law, is taken upon the land, by reaſon of the view and freſh ſuit of the lord.

Leon. 301. Cro. Eliz. 146. Lucy *v.* Fiſher.

In avowry the defendant ſaid that *B.* was ſeiſed of the lands where, *&c.* and held them of *A.* by fealty and rent;—and for rent arrear he made conuſance as bailiff to *A.* in land held of him, according to the ſtatute.

ſtatute.—This was held a good avowry upon the ſtatute, though it was objected, that having once named the tenant in his avowry, the whole avowry ſhould have been at common law, becauſe the ſtatute was made to eſtabliſh the avowry without naming the tenant at all, and therefore it ought much more to be good, where he names him but once.

If *A.* holds of *B.* by rent, as of his manor of *C.* and *A.* conveys to the king, and the king grants it over to *D.*—*B.* cannot for his rent avow, as on land held of him; becauſe by *A*'s grant to the king the tenure is deſtroyed, though the rent remains; for the king cannot hold of a ſubject; and therefore *B.* muſt avow according to the nature and particular circumſtances of his caſe. And. 159. Broker v. Smith.

In avowries on the ſtatute, the lord alledges that the lands, or *locus in quo*, are held of him by ſuch ſervices, and avows as on lands within his fee or ſeignory, without naming or avowing upon any certain perſon or tenant; this diſtinguiſhes it from the avowry at common law, wherein the tenant muſt be named; but in both avowries the lord alledges ſeiſin of the ſervices. Raſt. Ent. 556. Bro. Abr. tit. Avow. pl. 4. Hern's Plead. 727. Co. Ent. 591, 594, 597, 598.

In the avowry at common law, the lord ſays *J. S.* his very tenant is ſeiſed in fee of the *locus in quo*, and that he holds of him by homage, fealty and rent, or ſuch like, of which ſervice the lord was ſeiſed by the hands of the ſaid *J. S.* and becauſe the

the rent, &c. was in arrear, the lord diſtrains and avows the taking, and prays a return. So that by this avowry to make the diſtreſs lawful, the lord muſt ſhew A SEISIN of the rent by the hands of ſome CERTAIN tenant; for the lord's poſſeſſory right is mentioned in no other manner, than by ſhewing that the tenant, who was in the actual poſſeſſion of the land, did actually pay the rent to the lord, or to thoſe under whom he derives: for if ſo, the ſeiſin of the tenant of the land, and of thoſe claiming under him, continued for the time of ſuch payment of the rent, to the time of the diſtreſs, is a ſeiſin in order to continue the payment to the lord; for out of the yearly profits he ought to have made the payment demanded.—

8 Co. 54. a.
Co. Lit. 298. b.

Therefore it is not like the caſe of any real action, where they lay the ſeiſin within the time of limitation, and that they were diſpoſſeſſed; for in ſuch real actions the count ſuppoſes the demandant is out of poſſeſſion of the thing to be recovered. But in the avowry, the lord ſuppoſes his ſeiſin to continue, until the very actual taking of the diſtreſs; and therefore the lord need not alledge his ſeiſin to be within forty years, according to the ſtatute of limitation, when the lord ſuppoſes himſelf ſtill ſeiſed, even at the very day of the avowry, and that this diſtreſs is the very collection of the rent of which he is in poſſeſſion. If he were not in poſſeſſion the diſtreſs would be unlawful; for if the lord had a right to the ſervices, yet if he was not actually ſeiſed of them, he muſt be put to his writ of cuſtoms and ſervices, before

before he can continue the ſeiſin of the ſervices, in order to recover them in this poſſeſſory action.

When the tenant comes in, if he does not diſclaim, or plead *hors de ſon fee*, of which hereafter, he muſt admit that he is ſeiſed of the eſtate; though he may deny that he holds that eſtate of the lord by ſuch ſervices, which is a traverſe of the tenure; or he may traverſe the ſeiſin of the ſervices by that particular hand by which the lord in his avowry alledges himſelf to be ſeiſed: —becauſe, if that ſeiſin be deſtroyed, which is the ſeiſin from whence the lord continues his own poſſeſſion to the time of the new caption, there is an interruption of the ſeiſin of the lord, and of his title in this poſſeſſory action. And therefore, if that ſeiſin be found againſt the lord, he cannot recover in replevin, becauſe he is out of poſſeſſion; but is driven to his writ of cuſtoms and ſervices, in order to recover the ſeiſin.

If the lord avows for rent on a gift in tail, or leaſe for life, or years, there the lord lays, that he, or the perſon from whom he claims, was ſeiſed in fee of the land itſelf, and that he, or ſuch perſon made ſuch demiſe or gift; and by this method the lord continues his right to ſeize the diſtreſs. Doct. Plac. 317, 318. Bro. Abr. tit. Avow. pl. 52.

And here plainly the lord continues his ſeiſin to the very time of the diſtreſs; becauſe his tenant was ſeiſed of the very land itſelf, in order to raiſe ſuch rent, and pay it

it to him by the original ſtipulation; and therefore the ſeiſin of the tenant was all along the ſeiſin of the lord, and maintains his poſſeſſion in order to take pledges for his rent.

But if ſuch gift in tail, or leaſe for life or years, were made before the ſtatute of limitations, and there had been no ſeiſin continued, there the ſtatute of limitations, may be pleaded in bar,—becauſe the words and intention of that ſtatute are to bar ſuch antient rights, where the lord had not actual ſeiſin within the forty years.

8 Co. 65. Doct. Plac. 317, 318. Brownl. 169, 170.

If a man makes a grant of a rent-charge, there the ſeiſin of eſtate is laid in the tenant of the land, and it is the deed that gives him ſeiſin of ſuch rent, or the power to get it. And there if the tenant cannot deny the deed, if the commencement of it be within the act of limitation, the grantee's power of diſtraining will thereby appear, and his right to continue the poſſeſſion under that deed.

And if any other actual ſeiſin had been required by the law in caſes of leaſes, gifts in tail, or rent-charges, the lord would have no compulſory means to acquire ſuch rent at firſt, without the tenant's voluntary payment, which had been to elude ſuch leaſes, gifts and deeds; and therefore the ſtatute of limitations does not extend to ſuch leaſes, gifts or deeds of rent-charge, where the law, before the ſtatute, required no ſeiſin at all neceſſary to be alledged in the

the avowry; ſince, as is ſaid, the lord and grantee continue the poſſeſſion of ſuch rents without actual ſeiſin, and the ſtatute hath not altered the law in that particular.

If *A.* be poſſeſſed of a term of years, rendering rent, and diſtrains the beaſts of a ſtranger for an arrear of this rent, it is not ſufficient for *A.* in his avowry to ſay generally *quod poſſeſſionatus fuit* of the *locus in quo*; becauſe *A.* having taken the beaſts of a ſtranger, he muſt ſhew by what title he took them; and this cannot be done without alledging a ſeiſin in fee in his leſſor, in order to ſhew a right in himſelf to diſtrain.

If *A.* leſſee for years, lets for years to *B.* by deed indented, and diſtrains *B.* for rent, it is ſufficient for him in his avowry to ſay *quod poſſeſſionatus fuit* and leaſed to *B.* by deed indented; for then *B.* will be eſtopped to controvert *A*'s title to the land during the leaſe; though *B.* had taken a leaſe of his own land from *A.* But if the leaſe were by parol, then it ſeems he muſt alledge the ſeiſin in fee;—becauſe taking the property of another, and there being no eſtoppel in the caſe, whereby the plaintiff in replevin cannot controvert the right of *A.* to the land, it ſeems that *A.* muſt ſhew a right, or elſe he cannot maintain the taking of another's property. 3 Lev. 146.

[But now by the ſtatute of 11 *G.* 2. *c.* 19. *ſ.* 22. reciting that "great difficulties often "ariſe in making avowries or conuſance "upon

" upon diſtreſſes for rent, quit-rents, re-
" liefs, heriots, and other ſervices," it is enacted " that it ſhall be lawful for all defendants in replevin to avow or make conuſance GENERALLY, that the plaintiff in replevin, or other tenant of the lands and tenements whereon the diſtreſs was made, enjoyed the ſame under a grant or demiſe at ſuch a certain rent, during the time wherein the rent diſtrained for incurred, which rent was then and ſtill remains due; or that the place where the diſtreſs was taken was parcel of ſuch certain tenements, held of ſuch honor, lordſhip or manor, for which tenements the rent, relief, heriot, or other ſervice diſtrained, was at the time of ſuch diſtreſs, and ſtill remains due; without further ſetting forth the grant, tenure, demiſe, or title of the landlord, leſſor, or owner of ſuch manor.

2 Wilſ. 214. " This ſtatute was made for the benefit of landlords, and to prevent tenants from putting them to trouble, by prying into titles and picking holes in ſettlements and wills, and alſo, to remove the difficulty the landlord was under to recover his rent when the eſtate was in mortgage."

2 Lutw. 1492. 3 Mod. 132. Carth. 9. 2 Mod. 70. contra. See Fort. 256. Salk. 643. Lucas 37. If a termor diſtrains the beaſts of another *damage feaſant*, and the owner of the beaſts brings his action of treſpaſs or replevin, it is not ſufficient for the termor in his juſtification or avowry to ſay *quod poſſeſſionatus fuit* generally; (*a*) becauſe where the termor

(*a*) According to the modern precedents, it is ſufficient to ſhew a poſſeſſion. Vide 3 Wilſ. 21. Pl. Aſſ. 485. Morg. Prec. 638. Ld. Raym. 322. n. 4th edition.

takes

takes the beaſts themſelves for the damages, he muſt ſet forth by what right or title he took them, for he cannot ſeize another's beaſts for any damages done to that which doth not appear to be his rightful poſſeſſion or property; and therefore the termor to juſtify this caption in treſpaſs, or in his avowry, where the proprietor ſeeks a reſtitution of his beaſts by replevin, muſt alledge the ſeiſin in fee in his leſſor, and ſo derive a title to himſelf.

[In treſpaſs, I believe *quod poſſeſſionatus fuit*, is ſufficient.]

"Where the action is tranſitory (as treſpaſs for taking goods), the plaintiff is forecloſed to pretend a right to the place, nor can it be conteſted upon the evidence, who had the right; therefore poſſeſſion is juſtification enough for the defendant; and it is ſufficient for him to plead that he was *poſſeſſed* of the place called *Blackacre*, and that he took the goods *damage feaſant* there, without ſhewing any title. But it is otherwiſe in treſpaſs *quare clauſum fregit*, becauſe there the plaintiff claims the cloſe, and the right may be conteſted." Salk. 643. Bull. Ni. Pri. 5 Ed. 89.

But if the avowant for *damage feaſant* alledges the *locus in quo* to be his *ſolum & liberum tenementum*, that is ſufficient without alledging the ſeiſin in fee; for the quantity of the eſtate is not material where the avowant poſſeſſes *jure proprio*; for he hath ſhewn enough to entitle him to the caption, if the *locus in quo* be his *liberum tenementum*. Raſt. Ent. 561. b. Clift's Entr. 564. Owen 51. Dyer 171. b. Brown's Entr. 304. Ld. Raym. 333. 475.

mentum. (*a*) But the leſſee that poſſeſſes *nomine alieno* hath no more than a precarious poſſeſſion, which is either good or bad according to the eſtate of him in whoſe right he poſſeſſes; and therefore if he doth not ſhew an eſtate to entitle himſelf to the caption, he doth not ſhew any right to take them at all: for it covers the right only to ſhew a term, and not a freehold out of which it is derived. It is only the freeholder, or his bailiff, or perſon deriving under him, that hath authority to take another man's beaſts upon the ſoil; for a ſtranger that is no bailiff of the freeholder is a treſpaſſer, if he doth it; and therefore if a perſon doth not ſhew in his avowry that he doth it in his own right, or by whoſe right he doth, he ſhews no right at all to take ſuch diſtreſs.

But if the termor inſtead of taking the beaſts into his own hands for a compenſation of damages, ſhall recur to the law to have amends by action of treſpaſs *quare clauſum fregit*, ſince here he comes to the law only for a compenſation for the damages done to his poſſeſſion, he hath nothing to do but to ſhew his poſſeſſion, unleſs the defendant ſhew a right to the land itſelf.

Clift. 642. Hob. 28.

If the grantee of a rent-charge avows for his rent, he muſt alſo alledge a ſeiſin in

(*a*) In an avowry for damage feaſance, it is ſufficient for the avowant to ſtate that he was ſeiſed as of freehold. R. acc. Ow. 51. 2 Wilſ. 269. Pl. Aſſ. 471, 475. Morgan Prec. 600. To ſtate generally that he was ſeiſed, not. Ld. Raym. 333. 4th edition in marg.

fee-

fee-ſimple in his grantor of the lands out of which the rent iſſues; for this being a rent not ariſing from any tenure, doth not turn on the rule that governs the feudal ſervices. The reaſon is, that the avowry being in the nature of a declaration, the avowant, as all other plaintiffs in other actions ought to ſhew to the court, that what he ſues for is ſubſiſting, and this he doth not do unleſs he alledges a ſeiſin in fee in the grantor; for if the rent-charge was granted in fee by a perſon who is only tenant for life, the grant determines by his death; and therefore the grantee ought to ſhew to the court that his grant has ſtill a continuance; which is beſt done by alledging a ſeiſin in fee in the grantor, and this ſeiſin in fee in the grantor is traverſable.

Bro. Abr. tit. Avow. pl. 88. 164.

But vide 11 G. 2. c. 19. ſ. 22. ante 139.

If tenant in fee leaſes for years, rendring rent, and brings an action of debt for the arrear of rent, he need not alledge any ſeiſin in fee in his declaration; becauſe the action of debt ariſes from the contract of the parties, and was not ſubſtituted by the feudal law in the place of forfeiture; and therefore in debt for rent, the leſſor only declares *quod cum demiſit* ſuch lands to *A.* for ſuch a term, rendering ſuch certain rents, by virtue of which demiſe *A.* entered, *&c.*

Salk. 562.

But where in debt for rent the plaintiff ſues AS ASSIGNEE OF THE REVERSION AND RENT, it ſeems by the precedent, that he muſt alledge a ſeiſin in fee in the leſſor; becauſe ſince the plaintiff did not demiſe himſelf, he muſt ſhew who did, and that the reverſion

Clift. 225.

came by ſuch aſſignment to him, in order to make his title to the action. For it ſeems abſurd that the plaintiff ſhould ſay, that the firſt leſſor granted the reverſion to him, without firſt ſhewing that he had it in himſelf. Hence it ſhould ſeem to be neceſſary even in debt for rent, to alledge in this caſe a ſeiſin in fee in the firſt leſſor, for he doth not come in as a repreſentative of the contractor, but as aſſignee of the reverſion; and therefore muſt ſhew the particular eſtate of the reverſioner.

Sid. 10. 20. Hob. 16.

In avowries there muſt be always a place CERTAIN mentioned where the caption was; as the avowant muſt admit the caption to be in the place mentioned in the declaration, in order to ſhew the cauſe of taking it there; for if the avowant ſhould lay the taking in another place than the plaintiff hath done, without traverſing the place mentioned in the declaration, this would be altogether bad: becauſe the avowant neither confeſſes and avoids, nor traverſes the declaration, and therefore ſuch plea is nugatory, and not to the purpoſe.

Lutw. 1231. Ld. Raym. 332. 4th edit.

"But if the defendant avows the caption in parcel of the place mentioned in the declaration, without giving it a particular name or deſcription, no objection can be taken to it unleſs upon ſpecial demurrer."

Danv. 653. Cro. J. c. 372. Wheacon v. Sugg.

Where a man avows in his own right, the form is *quod bene advocat captionem et juſte, &c.*—Where he makes conuſance in right of another, he ſays, *bene cognovit captionem, &c.*

Though

Though this be the regular form, yet it hath been held upon demurrer, that where the defendant avowed in his own right by *bene cognovit captionem, &c.* it was well enough; becauſe the avowry is a confeſſion of the caption, which both the words *advocat* and *cognovit* do confeſs, and avoids the injuſtice of ſuch caption for the reaſons mentioned in the avowry.

If the defendant avows for rent being in arrear at *Michaelmas, & tempore captionis;*— this is good, though he doth not ſay, *quod adhuc a retrò exiſtit:* for the avowant avoids the injuſtice of the caption, if he ſhews that the rent was in arrear at the time he took the beaſts. Nor is he obliged to ſay *quod adhuc a retrò exiſtit,* to excuſe himſelf from an unlawful detention; becauſe, after the beaſts are once impounded, no ſubſequent tender or payment can make the detention unlawful in this action. Daliſon fin. Benl. 72. Cro. Jac. 283.

In an avowry by huſband and wife in right of his wife, for arrears of a rent-charge incurred before the coverture, the avowry concludes, "*and becauſe at* Michaelmas, *&c.* 20l. *was in arrear and not paid to the huſband and wife, he diſtrained and avows, &c.*" It was objected, that by his own ſhewing the arrears were not due to himſelf and his wife, and therefore the avowry ill; but the objection was over-ruled, becauſe if he had ſaid, "*for* 20l. *arrear he diſtrained,*" that had been good, and the reſt was held ſurpluſage. Cro. Jac. 283. Bowles v. Poor, Bulſt. 139. S. C.

If one avows as adminiſtrator for arrears of a rent-charge, where he may claim the Hob. 208.

arrears in his own right, and it appears that the avowry is not ſo framed as to entitle him to the arrears as adminiſtrator, yet the avowry is good;—becauſe where there are two titles ſet forth in the avowry, and only one ſufficiently alledged, that one title only gives him as good a right to the rent as both, and therefore he ought to recover, and the avowry as adminiſtrator ſhall be ſurpluſage. As if a rent-charge be granted to the huſband and wife during the life of the wife, and the huſband dies, and the wife avows as adminiſtratrix to her huſband, where ſhe might avow *jure proprio*, yet ſhe having a title to it in her own right by the grant, the avowry is good.

Saund. 282. 284. Duppa v. Mayo, &c. Cro. Eliz. 340, 637, 651. Yelv. 23. Cro. Car. 154. Raſt. Entr. 565. a. Ro. Abr. 320. 2 Lutw. 1211. Carth. 328.

If a man avows for an entire rent, where it appears that he hath title only to a moiety of it, the avowant cannot recover; becauſe he hath not avowed according to the circumſtances of his caſe, and therefore cannot make out his title as he hath laid it. Suppoſe *A.* and *B.* were joint-tenants of a rent, and *A.* diſtrains and avows for the whole, this avowry is bad; for if it ſhould ſtand, and *A.* ſhould recover his moiety, then there muſt be two ſuits for one joint demand, which would be vexatious and abſurd. And in this caſe the avowry and action of debt ſtand on the ſame reaſon, and agree.

Salk. 390. Carth. 364.

So likewiſe coparceners muſt join in avowry; therefore if one joint-tenant or coparcener diſtrains alone, he muſt avow in his own right and as bailiff to the other.

If

If in the avowry the leſſor avows for only part of an half year's rent that is due, and doth not ſhew that the reſidue is ſatisfied, ſuch avowry is ill; becauſe where a certain rent is due it muſt be demanded at once; for if part only ſhould be demanded, and the reſidue not appear by the avowry to be ſatisfied, and the avowant ſhould recover that part which he demands, he may then multiply ſuits by ſuing for part of his rent at one time and part at another, which is againſt reaſon, and the end and policy of the law. And in this alſo, the avowry and action of debt for rent, agree.

Cro. Car. 104. 137. Cro. Jac. 498. 4 Mod. 402.

"So if a tenant holds ſeveral parcels of land of the ſame landlord, under diſtinct demiſes, the landlord cannot avow taking one entire diſtreſs for the rent of all."

Rogers v. Birkmire Str. 1040. Caſ. temp. Hardw. 145.

"An avowant in replevin may abate his own avowry for part of the rent diſtrained for, *before*, but not *after*, judgment: and if an entire judgment is given thereon, it ſhall be reverſed in *toto*."

Com. 427. Ld. Raym. 255.

If executors avow on the 32 *H.* 8. *c.* 37. for the arrears of rent in fee granted to the teſtator, they muſt ſhew that the lands liable to the rent-charge continue in the hands of the tenant or purchaſer in whoſe time the rent ſued for incurred; becauſe, this remedy being given by the ſtatute, the method preſcribed by the ſtatute muſt be obſerved.

Cro. Eliz. 547. Miles v Willoughby.

"But in the caſe of *Hool* and *Bell*, where an exception was taken to an avowry that the

Ld. Raym. 173. 4 Ed.

defendant had not averred that the place where, *&c.* was in the ſeiſin of the plaintiff before the arrearages incurred, and that the plaintiff had not claimed by, from, or under him who was tenant, the court held that ſuch an averment was not neceſſary, particularly if the avowant ſtated that the grantor was ſeiſed in fee."

2 Mod. 4, 5. In an avowry for a heriot, the avowant as bailiff to *J. S. bene cognovit captionem averiorum prædictorum in prædicto loco*, without ſaying, *tempore quo*, *&c.* and yet held good; becauſe the acknowledging the caption as ſet forth in the declaration, admits it to be at the time laid there.

Lit. Sect. 317. Co. Lit. 198. b. Cro. Eliz. 530. If two tenants in common diſtrain for rent, they muſt make ſeveral avowries, becauſe they claim the rent and reverſion by different titles, and therefore muſt ſeverally ſet them forth in diſtinct avowries.

Harriſon v. Barnby. 5 Term Rep. 246. "So if one tenant in common diſtrains for his ſhare of the rent which has been paid to the other tenant in common, after notice given to the terre-tenant not to pay it to the other, he muſt avow upon his ſeveral title."

5 Co. 19. a. 38. b. If two perſons diſtrain an ox, or an horſe, and are obliged to make different avowries, both avowries muſt abate; becauſe if both ſhould ſhew cauſe to have return, the court could not give judgment for both, and therefore neither can have it.

In an avowry for heriots, you cannot avow for a heriot generally, but you muſt avow for the beſt beaſt or the two beſt beaſts of the tenant, as the caſe is; for otherwiſe the plaintiff would be ouſted of his plea in bar, that the tenant left no beaſts. Hutton 4, Cro. Car. 260. Hob. 176.

"The avowant muſt juſtify and ſhew a good title in *omnibus*, that it may appear that he had authority to diſtrain, before he is entitled to a return."

"Thus where one of two defendants avowed the taking the cattle *damage feaſant* as tenant and occupier of a meſſuage under a preſcriptive right of common for all occupiers of meſſuages, it was held that the right of common being laid in the occupiers only, where it was neceſſary to have ſet forth a title, was bad, and on that account the judgment was arreſted." Engliſh v. Burnel & al. 2 Wilſ. 261.

II. Of the ſeveral Pleas to Avowries.

Though the avowant may now by the ſtatute avow as in lands holden of him and within his fee and ſeignory, yet it is provided by the ſaid act, that the plaintiffs and defendants in writs of replevin and ſecond deliverance ſhall have like pleas and like aid-prayers in all ſuch avowries, conuſances and juſtifications, as they might have had before, and as though the ſaid avowry, conuſance or juſtification had been made after the due order of the common law, pleas of diſclaimer only excepted. For this 21 H. 8. c. 19. ſ. 3.

this reaſon, and becauſe the lord is ſtill left to his avowry according to the common law, it will be neceſſary to conſider the ſeveral anſwers and pleas that at common law might have been made to the avowry; and herein,

1. Of the diſclaimer.

2. Of the plea *hors de ſon fee*.

3. In what caſes the tenure was traverſable.

4. In what caſes the ſeiſin of the ſervices was traverſable.

5. "Other pleas in bar to avowries for rent."

Of the Diſclaimer.

Raſt. Ent. 224, 225. Doct. Plac. 133. Co. Lit. 102. a. 268. b.

And here it is to be obſerved, that at common law the avowry was always upon ſome certain perſon, and if ſuch perſon claimed or pretended no right to the tenancy, he might have diſclaimed. By ſuch diſclaimer he denied to hold the tenancy of the land at all. It was a renunciation of his homage and fealty, and that he would not hold of the lord upon any terms. And therefore the lord, on ſuch diſclaimer, was entitled to the reſtitution of the land itſelf, which was originally given for the ſervices avowed for; and in order to bring back the land itſelf, the lord had a writ of right, ſetting forth the proceedings in the replevin, and ſuch diſclaimer. Hence we may ſee the reaſon why there could be no diſclaimer to any avowry on the ſtatute of

H. 8.

H. 8.—becauſe the avowry on the act is not on any perſon CERTAIN, but on lands within the lord's fee and ſeignory; and therefore whoever takes up the defence to ſuch avowry muſt be only a perſon concerned in the tenancy; becauſe if an entire ſtranger ſhould take up the defence, and be allowed to diſclaim, the lord could not have return of his diſtreſs, but muſt take his writ of right for the lands themſelves; and in the proſecution of that writ he could not prevail, as the rightful tenant would appear to bar him, and ſo the lord be diſappointed both ways.

But a diſclaimer cannot be where a man levies a fine of a ſeignory, and the conuſee brings a *per quæ ſervitia* to have the attornment of the tenant; becauſe the lord will not be entitled to the ſervices, or to the land itſelf in caſe of a diſclaimer, until he hath poſſeſſion of ſuch ſervices by attornment; therefore the tenant in the *per quæ ſervitia* ſhall not diſclaim, inaſmuch as the lord, upon ſuch diſclaimer, cannot have a right to the land itſelf. But whenever the lord is in poſſeſſion of the ſeignory, and purſues his right for the ſervices by replevin, *ceſſavit*, or the like, there the tenant may diſclaim; becauſe the lord on ſuch diſclaimer ſhall have the land itſelf, which was originally given for ſuch ſervices. Doct. Plac. 131, 132.

Here it is to be noted, that the tenant muſt be a perſon capable of the act of diſclaimer; for if he be an infant, ſuch diſclaimer ſhall not turn to his prejudice, by reaſon of his indiſcretion. Doct. Plac. 132.

So

Doct. Plac. 131, 132.

So where the tenant is ſeiſed of the lands in right of another, in order to preſerve ſuch right; and therefore the diſclaimer of the abbot ſhall not hurt the church, nor of the huſband, the wife; becauſe they are intruſted by law to defend the right of the tenancy, and not to deſtroy it.

Doct. Plac. 133.

If there be a lord, meſne and tenant, and the meſne diſclaim the right of the meſnalty, the meſnalty is extinct; and the tenant holds of the ſuperior lord, as the meſne held over; for here, by ſuch diſclaimer, the lord cannot have poſſeſſion of the land, becauſe the tenant's intereſt therein by the diſclaimer of another cannot be hurt; but the lord comes nearer the tenancy by ſuch diſclaimer, becauſe, if the tenant dies without heirs, the eſcheat of the lands is immediate to the lord and not to the meſne.

Doct. Plac. 133. Co. Litt. 362. a.

In a *formedon* which the ſtatute *de donis* hath given to recover the lands and not damages, if the tenant diſclaim, the demandant ſhall recover the land itſelf immediately; but in an aſſize and writ of entry, where the demandant ſeeks damages as well as the land, it is not enough for the tenant to diſclaim, becauſe then every diſſeiſor, when the action is brought againſt him, would diſclaim, in order to ſcreen himſelf from damages; but the demandant, notwithſtanding ſuch diſclaimer, may aver that he was tenant of the land, in order to have his damages.

If

If a *præcipe* be brought againſt two, and one diſclaim, the whole frank-tenement veſts in the other. But if one pleads non-tenure, the whole does not veſt in the other; becauſe though the other be not ſeiſed of them, yet a right may remain in him, and his pleading that he doth not hold the lands, doth not veſt the right in another. Doct. Plac. 133.

If one diſclaims, and the other pleads non-tenure, the demandant may enter into the whole;—becauſe by the diſclaimer of one, the tenancy ſhall not veſt in the other, who hath no ſeiſin againſt his own plea of non-tenure; and therefore the demandant's right of entry is open to him. Doct. Plac. 134.

If a *præcipe* be brought againſt two, and one makes default after default, and the other diſclaims, the demandant ſhall recover the whole; becauſe the default bars one, and the diſclaimer the other. Doct. Plac. 134.

Of the Plea of *Hors de ſon Fee.*

As the tenant may diſclaim, ſo he may plead *extra feodum*; and ſuch plea doth not amount to a diſclaimer; for if they ſhould conſtrue the plea of *extra feodum* to amount to a diſclaimer IN ALL CASES, then thoſe tenants that were boundaries of manors, would be exceedingly harraſſed by the neighbouring lords. And therefore as the tenant might diſclaim, which is an entire renunciation to hold of the lord, and whereby the tenant diſclaims to pay thoſe ſervices as the price of the Raſt. Ent. 566. b. See the form of the plea.

the land itſelf, ſo he may plead *hors de ſon fee*;—which is taking upon him the ſtate of the land, and acknowledging to hold by ſuch ſervices, if he be within the ſeignory of the lord. For in this plea he doth not renounce the ſervices, for that is the plea of diſclaimer, but he takes up the land under the ſervices the lord demands of him, and owns them as the price of the land, in caſe the lord be entitled to ſuch ſervices. And therefore the tenant may plead *extra feodum* as well as diſclaim in replevin; becauſe he may ſhew that he is willing to hold by ſuch ſervices, in caſe the lord be entitled thereunto.

Doct. Plac. 216. If the lord brings a writ of *mort d'aunceſtor* for his ſervices, the tenant cannot plead *hors de ſon fee*; becauſe there the lord makes title in his writ, and the tenant muſt anſwer to the title ſet out in the writ; therefore he cannot plead generally, out of his fee, for that doth not anſwer the title in the writ: but he muſt plead that the plaintiff's anceſtor did not die ſeiſed, which goes to the title in the writ.

Doct. Plac. 216, 217.
2 Co. 20. b. If the lord in replevin do not avow upon his VERY tenant, but upon a ſtranger, ſuch ſtranger, when he comes in, may plead that he himſelf is *extra feodum*; for having never held of the lord, the lord cannot maintain his avowry; the lord cannot ſay that he held of him, if the tenant never was in his homage. This plea of *hors de ſon fee* is the only plea that a mere ſtranger to the avowry, yet made party by *aid prayer*, may plead in ABATEMENT of the avowry.

But

But to explain this matter fully, we muſt conſider the ancient avowry of the lord upon diſſeiſins committed. On ſuch diſſeiſin, the diſſeiſor did not become tenant to the lord, (not even if the lord had accepted rent of him) ſo as to prevent the diſſeiſee from compelling the lord to avow on him; though by ſuch acceptance of rent the diſſeiſor was eſtopped to ſay, he was not his tenant; and the lord *quoad* him was alſo eſtopped from ſaying, that he was not his lord. So that if the diſſeiſee died without heirs, the lord could not enter into the tenancy, having already, by his own acceptance of the rent, admitted the land to be full of another: but between the lord and diſſeiſee, there was no eſtoppel at all: becauſe the diſſeiſin being a tortious act, if the lord did collude with ſuch diſſeiſor, that ſhould be no prejudice to the diſſeiſee. And it was often uſual on ſuch diſſeiſins, for the lord to obtain more rents from ſuch diſſeiſors; and when the diſſeiſee came to take poſſeſſion and put in his beaſts, the lord would diſtrain the beaſts of the diſſeiſee, and avow on the diſſeiſor for the rents that he had accepted from him. Now on ſuch avowry of the lord, it was a dangerous plea for the diſſeiſee to ſay, that "the diſſeiſor was out of the fee of the lord," becauſe the acceptance of ſuch rents and ſervices from the diſſeiſor brought him within the lord's fee; and therefore the diſſeiſee was compelled to ſhew the ſpecial matter, that he was very tenant to the lord;—that he had paid the ſervices, or tendered them, that were due; and that the lord ought to avow on him: the which was in abatement of the lord's avowry, becauſe

Co. Lit. 268.

9 Co. 21. a.

becauſe it deſtroyed that avowry upon his beaſts for the ſervices which the lord had accepted from the diſſeiſor, and compelled the lord to avow the caption of his beaſts for the tenure that was really due from the diſſeiſee to the lord. But as an inducement to this he was obliged to ſhew that the rent was tendered, or not in arrear, that the injury might appear on the lord's ſide, and that he did not accept of another for want of payment from him: and as the diſſeiſee might have entered himſelf and put in his beaſts, ſo he might have let to another, who might likewiſe put in his beaſts; and then if the lord had avowed upon the diſſeiſor, ſuch leſſee might have ſhewn, that there was a very tenant, the diſſeiſee who had paid or tendered the rent to the lord, and had made a leaſe to him who put in his beaſts which were diſtrained. For the leſſee, who kept poſſeſſion for the diſſeiſee, had the ſame privilege that the diſſeiſee himſelf had, to plead this ſpecial matter; becauſe he ſhould not be liable to the ſervices unjuſtly accepted from ſuch diſſeiſor; and he had a right to *pray in aid* of ſuch diſſeiſee, that the diſſeiſee who had the title-deeds of the land, might be brought in to make out his right; or, if he fail, that the leſſee might have the writ *de plegiis acquietandis* againſt ſuch leſſor.

9 Co. 20. So it is, if the very tenant in poſſeſſion made a leaſe to *A.* for years, and the lord had diſtrained *A.* and avowed upon a mere ſtranger;—*A.* might upon ſpecial matter, have *prayed in aid* of the leſſor, and by that means have brought him in to defend the tenancy from

from the diſtreſs of the lord, by compelling the lord to avow upon the leſſor: for *A.* being only a termor cannot plead the payment of the rent and ſervices without his leſſor, who is the very tenant; and when the leſſor is brought in, if the ſervices are really done, that abates the lord's avowry. If they are not performed, the lord ſhall have return of his pledges, but then *A.* hath a remedy over againſt his leſſor by writ *de plegiis acquietandis*.

But if the diſſeiſor had died ſeiſed, and the lord had accepted rent from the heir of the diſſeiſor who came in by title, the lord was obliged to avow on ſuch heir (*a*); and the entry of the diſſeiſee, or the right of putting in his beaſts, or demiſing to his tenants, was taken away; and then the diſſeiſee was not very tenant, nor could he compel the lord to avow upon him until he recovered his right in the real action. Lord *Coke* ſays, the feoffee of the diſſeiſor is in the ſame condition with the heir. But *quære* of this, unleſs it be in antient times, when a feoffment was conſtrued to toll an entry, as well as a deſcent. Co. Lit. 268. a.

When the lord avows upon a ſtranger, and takes the beaſts of a ſtranger, who is neither very tenant nor leſſee of the very tenant, ſuch ſtranger can plead nothing but *hors de ſon*

(*a*) But the opinion of the 48 E. 3. 9. ſeems to the contrary, becauſe when the tenant pleads the diſſeiſin, to compel the lord to avow upon him, it is ſtrange that the lord, by his own act of acceptance, ſhould maintain his avowry, and deſtroy the feudal contracts. Gilb. Ten. 64, 65. cit. Co. Litt. 268. a. 13th edition. Hargr. n. 2.

fee; becauſe he hath nothing to do with the right of rent, ſince the avowry is not on the very tenant. But ſuch ſtranger may diſengage himſelf by the plea of *hors de ſon fee*, becauſe the lord hath not ſhewn juſt cauſe of caption of ſuch beaſts, if he hath not maintained his avowry by proving ſuch ſervices are due from the perſon he avowed on.

When the Tenure is traverſable.

3 Co. 33. 59. Bucknal's caſe, Cro. Eliz. 799.

And this is when the tenant doth not entirely withdraw himſelf out of the homage of the lord, but doth not admit the ſame ſort of ſervices as the lord hath avowed for. As if the lord avows for fealty, rent, and ſuit of court, and alledges ſeiſin of all; if the ſervices were really but fealty and rent, the tenant in ſuch caſe may traverſe the tenure;—that is, he may admit that he holds by fealty and rent, and as to the rent that there is nothing in arrear, and traverſe the tenure with an *abſque hoc* that the tenancy was held by fealty, rent, and ſuit of court, *modo & formâ prædictâ, &c.* And in this caſe, though the avowry had been only for rent arrear, yet if the tenure thus traverſed be found againſt the lord, he ſhall not have return, becauſe the point in iſſue is found againſt him. The reaſon is, becauſe the tenure is the lord's title, and the lord muſt ſet forth his title as it really is; and therefore if it be by knight's ſervice, he muſt ſet forth by knight's ſervice; if it be by fealty only, he muſt ſet it forth ſo; if it be by fealty and rent, he muſt ſet forth in that manner; and if the lord fails in making out the

the title he hath ſet forth, there is an end of the lord's avowry, becauſe he doth not prove the title he hath alleged. But if the lord ſets out a title by 10*s.* rent, the tenant cannot ſay that he holds by 5*s.* *abſque hoc* that he holds by 10*s.*; becauſe the tenant holds by rent-ſervice, whether more or leſs, and the *quantum* of the rent doth not alter the nature of the ſervice, whether it be leſs or more. And after the ſtatute of *quia emptores* the ſervices were ſubdivided, but the tenure remained the ſame; and therefore it would have been a dangerous thing after the ſtatute, when the ſervices were ſubdivided and apportioned by the alienation of the tenant, to have ſuffered the tenant to have traverſed the quantity of the ſervices, which were more or leſs according to his ſhare of the land. They allowed him to traverſe the ſeiſin, as is ſaid hereafter, becauſe the lord could not recover more of him in replevin than the ſervices of which he was ſeiſed.

But the WHOLE TENURE IS NOT traverſable; as in the aforeſaid caſe, the tenant cannot plead that he holds the tenancy of a ſtranger by ſuch ſervices, *abſq; hoc* that he holds them of the avowant: becauſe by ſuch plea the tenant withdraws himſelf entirely from the homage of the lord, and where he does that, his proper plea is a *diſclaimer* or *hors de ſon fee.* 9 Co. 35. a. Doct. Plac. 318.

Where the Seiſin is traverſable.

And this is where the tenant doth not only take the eſtate of the land upon him, 9 Co. 33.

but admits alſo the tenure by the ſame ſort of ſervices, and diſagrees with the lord only in the quantity. As if the lord avows for 10*s.* rent, where the original reſervation was only of 5*s.* and the lord had obtained the ſeiſin of the 10*s.* by coercion of diſtreſs, the tenant may traverſe ſuch ſeiſin, and thereby avoid ſuch encroachment in the avowry. For the tenant in this caſe, cannot plead *hors de ſon fee*, becauſe he is plainly within the homage of the lord; nor can he traverſe the tenure, becauſe that is by the ſame ſort of ſervices as are avowed for. But he may traverſe ſuch ſeiſin of ſuch ENCROACHED ſervices, becauſe what the lord hath obtained by coercion, can be no foundation to ground a right upon. But if ſuch ſeiſin of the 10*s.* rent had been obtained by the voluntary payment of the tenant, he cannot traverſe ſuch ſeiſin, nor avoid the payment of ſuch encroached rent in the action of replevin; for the tenant cannot traverſe the tenure for the former reaſon, nor the ſeiſin, becauſe that iſſue muſt be againſt him, in regard the caſe ſuppoſes the lord to be actually ſeiſed by his voluntary payment; and therefore where the ſingle iſſue is whether the lord is ſeiſed or not, it muſt be againſt the tenant in his poſſeſſory action.

The tenant however may avoid ſuch encroached rent by *ne injuſtè vexes*; becauſe that is a writ of right, where the mere right to ſuch ſervices may be controverted, and conſequently the bare ſeiſin of the ſervices will not avail the lord, unleſs they were originally

originally reſerved. For when the bare right to the rent is in queſtion, there can be no reaſon to compel the tenant to pay that for ever, which he once paid though voluntarily in his own wrong. So it is in a *ceſſavit* brought by the lord, becauſe the mere right to the ſervices is controverted in it.

If the tenant, inſtead of ſuing a replevin for the diſtreſs taken by the lord for thoſe encroached ſervices, brings an action of treſpaſs againſt the lord, there the ſeiſin ſhall not conclude the tenant. So in an *aſſiſe* or writ of *reſcous*, brought by the lord; becauſe if the lord hath really no right to the encroached ſervices the lord is puniſhable as a treſpaſſer for taking the tenant's beaſts; and when there is no juſt cauſe of caption the tenant may reſcue; and if the lord bring a writ of *reſcous*, the mere right to the ſervices will come in queſtion; and if that appear againſt the lord, the tenant hath a right to reſcue the beaſts diſtrained. 9 Co. 34. a. Doct. Plac. 318.

But even the traverſe of the ſeiſin in the avowry is to be underſtood with theſe reſtrictions. 9 Co. 34. a.

For 1. The iſſue in tail may traverſe the ſeiſin of ſervices of the ſame nature, though the lord had obtained ſuch ſeiſin by the voluntary payment of the donee in tail; becauſe the donee, during the continuance of the intail, cannot charge or incumber the lands intailed, ſo as to bind or affect Doct. Plac. 318.

the iſſue; and for the ſame reaſon the ſucceſſor of a biſhop or prior, ſhall traverſe the ſeiſin of the encroached rent given by the voluntary payment of their predeceſſors.

9 Co. 34. a. Doct. Plac. 318. 2. So the VERY tenant ſhall traverſe ſuch ſeiſin, if he hath a deed to ſhew by which the ſervices were reſerved; for the deed deſtroys that title which the ſeiſin of the ſervices gave the lord, if theſe ſervices appear not to have originally been reſerved.

9 Co. 34. b. 3. The ſeiſin of ſervices by encroachment is not material where there is no tenure; becauſe, where there is no tenure, the tenant may plead *hors de ſon fee*, and ſo diſcharge himſelf from ALL ſervices.

9 Co. 34. b. 4. If the ſeiſin was not within the ſtatute of limitations, the tenant may plead the ſtatute to defeat the ſeiſin of the lord before the ſtatute of limitations; for this is a ſtatute bar to quiet men's poſſeſſions againſt ſtale demands. But the tenant in ſuch plea muſt acknowledge the tenure, to give the lord a writ of cuſtoms and ſervices, which being an action of an higher nature, hath longer time of limitation allowed to it than a poſſeſſory action.

Doct. Plac. 132. 9 Co. 34. b. 5. In avowries the tenant ſhall not plead *ne unq*; *ſeiſie de ſervices* generally, becauſe this amounts to a traverſe of the tenure; ſince if a man had never been ſeiſed of an immemorial ſervice, he can have no right to it. And in ſuch a caſe the tenure ought to

to have been traverſed, which ſtands confeſſed in this plea, ſince he hath not traverſed *quod non tenuit*.

6. The ſeiſin is not traverſable but only of ſervices for which the avowry is made, except a ſeiſin be alledged of ſervices of a higher nature, which include thoſe in the avowry. As if the tenure be by homage, fealty, rent, and a pound of pepper, and the lord alledges a ſeiſin of all; and avows only for the pound of pepper;— the tenant cannot traverſe the ſeiſin of the rent, becauſe it is not material whether the lord was ſeiſed of the rent or not to make out his demand for the pound of pepper. Yet if the tenure be by homage, eſcuage, and rent, and he alledges ſeiſin of all, and avows for homage which is included in eſcuage, there, by traverſing the ſeiſin of the eſcuage, you traverſe the ſeiſin of the homage, which the lord demands in his avowry. 9 Co. 35. a.

Other Pleas in bar to Avowries for Rent.

"The 11 *G.* 2. *c.* 19, has taken away the plea of *nil habuit in tenementis* to an avowry for rent for the enjoyment of land under a parol demiſe or agreement; that ſtatute relates to parol leaſes, or leaſes in writing not by deed: it meant that landlords in caſes of diſtreſs for rent, where there has been an enjoyment, ſhall not, in *replevin*, be obliged to ſet out their titles in their pleadings, tho' they ſhould go on as far as a *ſur-rebutter*, *&c. &c.* and to prevent tenants from put- Sullivan v. Stradling, 2 Wilſ. 208.

ting them to difficulties in recovering their rents under parol demiſes; but if this plea was admitted, it would overthrow the ſtatute."

Sapsford v. Fletcher, 4 Term Rep. 511.

"To an avowry for rent, by a tenant, his under-tenant may plead payment of the ground rent which he paid to the original landlord to protect himſelf from a diſtreſs: for that is a good payment of ſo much rent to the tenant, which is paid as part of the rent itſelf in reſpect of the land."

Bull. Ni. Pri. 60. 5th edit.

"So a tender and refuſal may be pleaded to an avowry for rent, without bringing the money into court, becauſe if the diſtreſs was not rightfully taken, the defendant muſt anſwer the plaintiff his damages."

4 Term Rep. 512. Laycock v. Tuffnell, E. 27 G. 3. cit. ibid. n. Bull. Ni. Pri. 181. 5th edit.

"But the plaintiff cannot plead a ſet-off becauſe this action is founded in a tort, and the 2 *G.* 2. does not extend to ſuch actions; and another reaſon why it may not be pleaded is, becauſe a ſet-off ſuppoſes a different demand, ariſing in a different right: neither can he give a mutual demand in evidence, where the defendant juſtifies under a diſtreſs."

Vernon v. Wynne, 1 H. Bl. 24. Barnes 249. Salk. 596.

"After an avowry made for rent arrear, the plaintiff may pay the rent into court, for which the defendant avows becauſe the demand is certain; but not where the damages are unliquidated."

Hunt v. Cope, Cowp. 243.

"A plea to an avowry for rent in arrear that the defendant pulled down a ſummer houſe, whereby the plaintiff was deprived of the uſe thereof, without ſaying that he was

"expelled

"expelled or put out of the ſame" is not ſufficient, becauſe that would be a mere treſpaſs and no eviction; though if the plaintiff had pleaded an eviction in bar, the facts ſtated might have been ſufficient for the jury to have found a verdict in his favour."

"If the plea in bar is inconſiſtent with the declaration, the plaintiff muſt fail: Thus where the plaintiff declared for taking his goods and chattels, to wit, a limekiln, *&c.* and the defendant avowed under a diſtreſs for rent in arrear, to which the plaintiff in his plea in bar replied that the limekiln was affixed to the freehold, and therefore not diſtrainable; the Court held that as the declaration treated the limekiln as a chattel, which might poſſibly have been true, and the plea in bar ſtated it to be a part of the freehold, it was inconſiſtent with, and a departure from, the declaration, and therefore gave judgment to the defendant." Niblet v. Smith, 4 Term Rep. 504.

1. Of the Judgment in Replevin.

It is already obſerved that on the execution of the writ of replevin by the ſheriff, the beaſts diſtrained are actually returned to the plaintiff, ſo that he hath the poſſeſſion and uſe of the cattle pending the ſuit; conſequently if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry is, *quod* (the plaintiff) *recuperet verſus* the defendant, *damna ſua occaſione præmiſſ'*, *ſed quia neſcitur quæ damna præd.* (the plaintiff) *ſuſtinuit occaſione præmiſſ'*, [that the plaintiff recover againſt the defendant his damages Co Ent. 573. b.

damages by occaſion of the premiſſes, but becauſe it is unknown what damages the aforeſaid (the plaintiff) has ſuſtained by occaſion of the premiſſes,] a writ of inquiry is awarded to inquire; *quæ damna præd.* (the plaintiff) *ſuſtinuit tam occaſione præmiſſ', quam pro miſis et cuſtagiis ſuis, per ipſum circa ſectam ſuam in hâc parte appoſitis*, [what damages the aforeſaid (the plaintiff) hath ſuſtained, as well by occaſion of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended.] And on the return of this inquiſition, the plaintiff hath final judgment, *quod recuperet verſus præfatum* (the defendant) *damna ſua præd. ad*, &c. *per inquiſitionem præd' in formâ præd' comperta, nec non*, &c. *eidem* the plaintiff) *ad requiſitionem ſuam pro miſis & cuſtagiis ſuis præd' per curiam hic de incremento adjudicata; quæ quidem damna in toto ſe attingunt ad*, &c. *præd'* (the defendant) *in miſericordiâ.*"—"That he recover againſt the aforeſaid (the defendant) his damages aforeſaid to —— *l.* by the inquiſition aforeſaid, in form aforeſaid found; and moreover —— *l.* to the ſame (the plaintiff) at his requeſt, for his coſts and charges aforeſaid by the court here of increaſe adjudged, which damages in the whole amount to —— *l.* and the aforeſaid (the defendant) in mercy."

2d Book of Judgment. 203.

Carth. 362. 5 Mod. 118. Salk. 205. Co. Ent. 575. a.

This writ of inquiry muſt be underſtood to iſſue where the plaintiff hath judgment on a demurrer, *&c.* and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict aſcertains the damages that the plaintiff hath ſuſtained by the unjuſt caption and detention, and alſo the coſts of ſuit, and

and then there is no occaſion for a writ of inquiry. The judgment is, "*quod* (the plaintiff) *recuperet verſus* (the defendant) *damna prædicta per juratores prædictos in formâ prædictâ aſſeſſa, nec non*, &c.—*pro miſis*, &c. *de incremento adjudicata*, &c.—And the defendant *in miſericordiâ*," "that the plaintiff recover againſt the defendant the damages aforeſaid, by the jurors aforeſaid, in form aforeſaid aſſeſſed; and moreover —— *l.* for coſts, *&c.* of increaſe adjudged, *&c.* and the defendant in mercy."

On the other hand, if judgment be for the avowant on demurrer, then the entry is, "*quod* (the plaintiff) *nil capiat per breve ſuum præd' ſed ſit in miſericordiâ pro falſo clamore ſuo, & præd'* (the defendant) *eat inde ſine die*, &c. *& habeat retornum averiorum præd' detinend' ſibi irrepleg' in perpetuum, & qualiter*, &c. *vic' conſtare faciat hic*, &c. *& quod præd'* (the defendant) *damna ſua occaſione præmiſſ' recuperare debeat; ſed quia neſcitur*, &c."—"That the plaintiff take nothing by his writ aforeſaid, but be in mercy for his falſe claim, and the aforeſaid (the defendant) go hence without day, *&c.* and have the return of the beaſts aforeſaid detained to him irrepleviſable for ever, and in what manner, *&c.* the ſheriff make appear here, *&c.* and that the aforeſaid (the defendant) ought to recover his damages by occaſion of the premiſſes; but becauſe it is unknown, *&c.*

Co. Ent, 572. b. 2d Book of Judgm. 205.

21 H. 8. c. 19.

But if there be a verdict for the avowant, the jury in that verdict aſcertains the damages, and then there needs no writ of inquiry; but the

2d Book of Judgm. 206.

the judgment is entered, "*quod* (the defendant) *habeat retornum averiorum prædictorum*, &c. *Conſideratum eſt etiam quod præd'* (the defendant) *recuperet verſus præf.* (the plaintiff) *damna ſua præd'* &c. *per juratores præd' in forma præd' aſſeſſa, nec non*, &c. *eidem* (the defendant) *ad requiſitionem ſuam pro miſis & cuſtagiis*, &c."—"That (the defendant) have the return of the beaſts aforeſaid, *&c.* It is alſo conſidered, that the aforeſaid (the defendant) recover againſt the aforeſaid (the plaintiff) his damages aforeſaid, *&c.* by the jurors aforeſaid in form aforeſaid aſſeſſed; and moreover —— *l.* to the ſame (the defendant) at his requeſt for coſts and charges, *&c.*

2d Book of Judgment 206.

So that wherever the judgment is given on a verdict, either for plaintiff or defendant, that verdict aſcertaining the damages, there needs no writ of inquiry to iſſue; but where the judgment is not founded on a verdict, but on a demurrer or *non proſſ'* of the plaintiff, *&c.* there the damages muſt be aſcertained by a jury on a writ of inquiry; becauſe what damages either party hath ſuſtained, is a matter of fact, and therefore to be ſettled by a jury. But if both parties conſent that the court ſhall ſettle the damages without a jury, then the entry is, *ſuper quæ juſtic. hic ad petitionem ipſius* (the defendant) *ex aſſenſu præd'* (the plaintiff) *aſſident damna ipſius* (the defendant) *occaſione præmiſſ'*, &c. *ultra miſas*, &c." And this judgment is good, *quia conſenſus tollit errorem.*

"In an action againſt two defendants where one avowed and the other made cognizance

nizance for taking the diſtreſs for rent in arrear, and the plaintiff in his plea in bar ſaid nothing was in arrear, on which iſſue was joined, the Court held that a judgment entered "that the defendants ſhould have a return of the cattle, and recover their damages and coſts aſſeſſed by the jury", was good, either as a judgment at common law, tho' the return be not adjudged irrepleviſable, or as a judgment under 21 *H.* 8. *c.* 19. which intitles the defendants to damages and coſts: becauſe now in point of law the return is irrepleviſable; beſides it is an invariable rule, that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, becauſe he is not injured by it."

Gamon v. Jones in error, 4 Term Rep. 509.

[By the 17 *Car.* 2. *c.* 7. it is enacted, that "wherever the plaintiff in replevin, upon a diſtreſs FOR RENT, ſhall be nonſuit before iſſue joined, in any court of record, the defendant making a ſuggeſtion, in nature of an avowry or cognizance for the rent in arrear, to aſcertain the court of the cauſe of the diſtreſs,—the Court, upon his prayer, ſhall award a writ to the ſheriff, to inquire of the ſum in arrear, and the value of the goods or cattle diſtrained. And that, upon the return of ſuch inquiſition, the defendant ſhall have judgment to recover againſt the plaintiff the arrearages of rent, in caſe the goods or cattle diſtrained ſhall amount unto that value; and in caſe they ſhall not amount to that value, then ſo much as the value of the goods or cattle diſtrained ſhall amount unto, with his full coſts of ſuit; and ſhall have execution for the

the ſame by *fieri facias*, *elegit*, or otherwiſe. And by the ſame ſtatute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in caſe the plaintiff ſhall be nonſuit after cognizance or avowry, made, and iſſue joined, or if the verdict ſhall be given againſt the plaintiff, then the jurors that are impanneled to inquire of ſuch iſſue, ſhall, at the prayer of the defendant, inquire concerning the ſum in arrear, and the value of the goods or cattle diſtrained. And thereupon the avowant, or he that maketh cognizance, ſhall have the like judgment, &c." as before (*a*).

2 Wilſ. 117. By this ſtatute the Legiſlature intended, that the proceeding by *writ of inquiry*, *fieri facias*, and *elegit*, ſhould be final, for the avowant to recover his damages, and that the plaintiff ſhould keep his cattle, notwithſtanding the courſe of awarding a *retorno habendo*, which is the right judgment; for the ſtatute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

Freeman v. Lady Archer, Bl. 763. "Where a defendant avowed for a year's rent, and had a verdict, but no value being found by the jury, a motion was made to the Court for a rule to ſhew cauſe why a writ of

(*a*) In the caſes of Valentine v. Faucet, 2 Str. 1021. and in Ann. 138, Lord *Hardwicke* laid it down, that in every caſe, unleſs where the Court is tied up by this ſtatute, a writ of inquiry may be granted in order to do complete juſtice.

inquiry

inquiry ſhould not iſſue under 17 *Car.* 2. *c.* 7. to aſcertain the amount of the rent in arrear, and the value of the cattle diſtrained? *Gould* J. doubted whether it could be granted to ſupply a defective verdict in caſe of rent, though he held that after judgment by default, it certainly would lie, and added, that *Burrow*'s note of the caſe of *Andrews* v. *James*, *M.* 24 *G.* 2. *B. R.* which was cited in favour of the rule, ſtated that to be a judgment by default, however no cauſe being ſhewn, the rule was made abſolute."

The defendant had judgment upon demurrer for a return irrepleviſable, as at common law, upon which a writ of inquiry was awarded purſuant to the ſtatute. And on error brought, it was objected, that when the defendant proceeds on the ſtatute, he ought not to have judgment for a return; but the Court held that the judgment was well given, for the reaſons before mentioned. Carth. 253.

But where the defendant pleaded *non cepit*, and after obtaining judgment of *retorno habendo*, procured a writ of inquiry of damages to be executed,—the Court ſet aſide the writ of inquiry, and the inquiſition taken thereon, becauſe there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin. Ca. of Prac. in C. P. 42.

Where the jury who try the iſſue, omit to inquire of the rent in arrear, purſuant to the ſtatute, no writ of inquiry can be AFTERWARDS awarded to ſupply the omiſſion; and therefore, 1 Lev. 255.

therefore, in ſuch caſe, the defendant muſt purſue the common law judgment of *retorno habendo.* But where the defendant avows, as overſeer, for a poor's rate, under the 43 *Eliz. c.* 2. and the plaintiff is nonſuit, or a verdict paſſes againſt him, and the jury are diſcharged without inquiring of the treble damages, given by that ſtatute to the defendant, the defect may be cured by a writ of enquiry; becauſe ſuch inquiry is no more than an inqueſt of office.

Carth. 362. 3 Wilſ. 442.

Rees v. Morgan in error, 3 Term Rep. 349.

"If the jury find a verdict for the defendant with damages, without finding either the amount of the rent in arrear, or the value of the diſtreſs, the defendant may take a judgment *pro retorno habendo*; or he may amend the judgment for the damages, even after the record is removed into a court of error by ſubſtituting a judgment for a *retorno habendo:* and if he neglects making ſuch amendment, a court of error, tho' it reverſe the judgment for the damages, will award a judgment for a *retorno habendo*, and give the defendant coſts up to the time of the judgment in the court below."

As to the coſts in replevin, it is to be obſerved, that as the plaintiff in ſuch action might have recovered damages at the common law, before the ſtatute of *Glouceſter*, ſo now by that ſtatute, (*c.* 1.) he is entitled to coſts, as a conſequence of thoſe damages. But the avowant or defendant in replevin had no right to coſts till the 7 *H.* 8. *c.* 4. which gives damages and coſts to every avowant, and to every perſon making cognizance, or juſtifying

juſtifying as bailiff in replevin, for any rent, cuſtom or ſervice, if his avowry, cognizance or juſtification be found for him, or the plaintiff be otherwiſe barred. The ſtatute of 21 *H.* 8. *c.* 19. extends the ſame benefit to defendants, avowing, making cognizance, or juſtifying, for *damage feaſant*.

"Theſe ſtatutes extend to avowries made for an eſtray, but not to pleas of *priſel en auter lieu* upon which the writ is abated." Tidd on Coſts 40. Com. Rep. 122.

It has been holden, that altho' the power of making an avowry be given to an executor by the 32 *H.* 8. *c.* 37. which is ſubſequent to both the ſtatutes which give coſts to an avowant.—yet ſuch executor is entitled to coſts, altho' they be not mentioned in the ſtatute which gives the avowry. 2 Rol. Rep. 437.

But it has been reſolved, that the defendant in replevin ſhall not recover coſts, if he claim property in the diſtreſs; becauſe that is a caſe omitted out of the ſtatutes which give the defendant his coſts in replevin. *Tamen quære*; for by the ſtatute of 4 *Jac.* 1. *c.* 3. the defendant obtaining judgment, ſhall recover coſts in every action, wherein the plaintiff might have recovered them againſt the defendant. And therefore in another caſe, where the defendant avowed for an amerciament by a court leet, which is equally a *caſus omiſſus* with the former; it was holden, that the avowant ſhould have his coſts (*a*). Hard. 153. Cro Jac. 520.

(*a*) Sed vide Cro. Eliz. 300. *Semb. contra.*

When the defendant proceeds by inquiry on the 17 *Car.* 2. *c.* 7. he ſhall recover his full coſts of ſuit, as appears before.

And by the 11 *G.* 2. *c.* 19. which declares it to be lawful for the defendant in replevin to make a *general* avowry or cognizance for rent, relief, heriot, or other ſervice, it is enacted, that "if the plaintiff in ſuch action ſhall become nonſuit (*a*), diſcontinue his action or have judgment againſt him, the defendant ſhall recover DOUBLE coſts of ſuit.

Barnes's Notes 4to. 148.

The defendant in replevin avowed the taking as a *ſeizure* for an heriot *cuſtom*; and the plaintiff being nonſuited, a queſtion aroſe, Whether the defendant was entitled to double coſts? And it was holden that he was not; for, the avowry not being for a diſtreſs, the caſe is not within the ſtatute.

3 Bur. 1284.

By the 8 & 9 *W.* 3. *c.* 11. it is enacted, that "where ſeveral perſons ſhall be made defendants in any action or plaint of treſpaſs, *&c.* and any one or more of them ſhall be acquitted by verdict, every perſon ſo acquitted ſhall recover his coſts." But it has been holden that this ſtatute does not extend to actions of replevin; for the word *treſpaſs*, as

(*a*) It is obſervable that in an action of replevin there can be no judgment as in caſe of a nonſuit, for not going to trial according to the practice of the court in which the cauſe is pending, becauſe both parties being actors, the defendant may carry down the record by proviſo; and the whole Court ſaid that the 14 G. 2. c. 17. for preventing vexatious delays, had never been extended to actions of this kind. 1 Bl. 375. Jones v. Concannen, 3 Term Rep. 661.

it

it is there uſed, only relates to treſpaſſes *vi et armis.*]

"An avowant is a defendant within the meaning, tho' not within the words of the 4 *Ann. c.* 16. *ſ.* 5. which gives coſts if any ſpecial matter pleaded by virtue of that ſtatute by any defendant, tenant, or plaintiff in replevin ſhall be judged inſufficient on demurrer, or found for the plaintiff or demandant on verdict, and ſhall pay coſts on the ſpecial avowries found againſt him." Stone v. Forſyth, T. 22 G. 3. Dougl. 709. n. 3d edit.

"And accordingly where ſome iſſues in replevin are found for the plaintiff, which entitle him to judgment, and ſome for the defendant, the latter muſt be allowed the coſts of the iſſues found for him out of the general coſts of the verdict; unleſs the Judge certify that the plaintiff had a probable cauſe for pleading the matters, on which thoſe iſſues are joined: and *Buller* J. ſaid the general rule is this, where ſeveral matters are pleaded by the plaintiff, ſome of which are found for him, and others for the defendant, ſo that the plaintiff is entitled to judgment; if the Judge who tried the cauſe certify that there was a probable cauſe for pleading thoſe pleas, the Maſter is not to deduct the coſts of the iſſues ſo found for the defendant, but if there be no certificate, the defendant is entitled to have thoſe coſts deducted for him." Barnes 141. Dodd v. Joddrel, 2 Term Rep. 235.

"It was held that an avowant was not a plaintiff within the meaning of 3 *H.* 7. *c.* 10. "which gives a plaintiff coſts and damages where the defendant ſues a writ of error before Coan v. Bowles, cit. Dougl. 709. n. 3d edit.

fore execution" ſo as to be entitled to coſts on the affirmance of a judgment in his favour upon the writ of error."

Say. Rep. 250. "Where there is an iſſue on the defendant's being bailiff upon a plea of diſtreſs for rent, a certificate is neceſſary to entitle the plaintiff to full coſts."

As to the *Retorno Habendo*, and *Second Deliverance*.

In all caſes where the defendant in replevin avows and hath judgment on ſuch avowry, he ſhall have return of the beaſts awarded; becauſe the avowry allows the caption, but avoids the injuſtice thereof, by ſhewing he had good cauſe of taking ſuch diſtreſs; and conſequently, if ſuch cauſe of caption be approved of by the Court, they muſt, in juſtice, return the pledge to the avowant.

And where the defendant, inſtead of an avowry, pleads to the writ of replevin; that is, where he does not admit the caption and avoid the injuſtice of it, but by plea inſiſts, that the plaintiff ought not to have the writ of replevin, whether he the defendant took them or not; yet here the defendant in ſome caſes ſhall have return without any avowry or conuſance made.—And in order to ſettle this, it will be neceſſary to take up a diſtinction already obſerved, between pleas that diſ-affirm property in the plaintiff, and pleas that admit property in the plaintiff. As if the defendant in the replevin pleads property in

Salk. 94.

the beaſts himſelf, or in a ſtranger, (whether it be pleaded in abatement of the writ in bar of the action, or in juſtification,) if the defendant prevails in it, he ſhall have return WITHOUT ANY AVOWRY; becauſe if theſe pleas be true, they deſtroy all right of complaint in the plaintiff for the caption and retention: and if the plaintiff hath no right to the writ of replevin, under the preſent form, nor under any other, he ought to have no benefit from his unjuſt complaint; and therefore the Court muſt award reſtitution of the beaſts to the defendant, out of whoſe poſſeſſion they were taken by the replevin.

Bro. Abr. tit. Retorn des Avers, pl. 28. Vent. 249.

But if the defendant pleads property in the plaintiff, and *J. S.*—though this plea abates the writ under the preſent form, yet by admitting the property in the plaintiff, it ſhews that the plaintiff and *J. S.* have a right to a replevin, though under another form, and conſequently the defendant ſhall not have return of the plaintiff's beaſts, unleſs he ſhews good cauſe for ſuch return, and avoids the injuſtice of the firſt caption complained of by the plaintiff.

So if the plaintiff in replevin lays the caption in *D.* and the defendant pleads that he took them in *S. abſque hoc* that he took them in *D.*—This plea, if found for the defendant, may excuſe him from damages, but can never give him a return of the beaſts without a conuſance or an avowry; becauſe he leaves the plaintiff a right to retain his beaſts, when he neither denies the property

Bro. Abr. tit. Retorn des Avers, pl. 28. Raſt. Ent. 554. Ld. Raym. 1017. Poſt. 175.

to be in the plaintiff, nor ſhews any cauſe why he ſhould take them as a pledge.

If the tenant offers his rent at the time of the diſtreſs taken, or before impounding, and the lord refuſes to accept it, he ſhall never after have return of the beaſts, though the rent be in arrear;—becauſe the diſtreſs is but a pledge for the rent, and when the rent is offered, the pledge ought to be reſtored; conſequently the Court will never award the return of the pledge to the lord, which he ought to have reſtored to the plaintiff before the replevin was taken out.

Bro. Abr. tit. Retorn. des Avers, pl. 33. Dyer 280. pl. 14.

If the plaintiff be nonſuit before he declares, the defendant ſhall have return of the beaſts without making any conuſance or avowry; becauſe where there is no expreſs charge made againſt the defendant by a declaration in court, the defendant hath not an opportunity to ſhew his cauſe of caption; and ſince this is owing to the default of the plaintiff, he ſhall have no advantage from it by detaining the beaſts; and therefore the defendant, on ſuch nonſuit, ſhall have return, though he hath made no avowry. But if the plaintiff in replevin hath counted, and afterwards is nonſuited; ſince by the count, the defendant is charged with an unjuſt caption and detention, he muſt purge himſelf thereof by an avowry, before he can be entitled to have return; for the return of the beaſts is ordered by the court on the juſtice of the original caption; and therefore the defendant

fendant muſt firſt ſhew the juſtice of this caption, before he can have a return.

The return in this action was never irrepleviſable at common law, whether the nonſuit of the plaintiff had been before the avowry or after, or before or after iſſue joined; becauſe where the defendant had judgment for a return on a nonſuit, though after verdict, that judgment was not founded upon the verdict, but on the default of the plaintiff in withdrawing himſelf, at any continuance day after the verdict. So that though the defendant had return, yet he had not the juſtice or legality of his caption eſtabliſhed by ſuch judgment; and therefore as long as the caption and detention was not determined by the judgment of the Court, ſo long they allowed the plaintiff after his own non-ſuit to take a new replevin.

Bro. Abr. tit. Retorn des Avers, pl. 23. 2 Inſt. 340.

But this was found very inconvenient, becauſe by this means the defendant could never get reſtitution of the beaſts; and therefore was not likely to recover his rent, ſince he wanted the pledge to compel the tenant to the payment.

To remedy this miſchief the ſtatute of *Weſt.* 2. *c.* 2. taking notice, that *poſtquam adjudicatum fuerit diſtringenti retornum averiorum, et ſic diſtrictus, poſtquam averia ſic retornata iterum replegiaverit, et cum viderit diſtringentem comparentem in curiâ, paratum ſibi reſpondere, defaltam fecerit, ob quam iterum readjudicabitur diſtringenti retornum averiorum,*

riorum, et ſic bis, vel ter, et in infinitum replegiabuntur averia; provides, that *quam cito adjudicatum fuerit retornum averiorum diſtringenti, per breve de judicio mandetur vicecomiti, quod retornum habere faciat diſtringenti de averiis, in quo brevi inſeratur, quod vicecomes ea non deliberet ſine brevi, in quo fiat mentio de judicio per juſticiarios reddito, &c.* which is the writ of *ſecond deliverance*. So that by this act, if the plaintiff in replevin be once nonſuit, he cannot now have a new replevin, but the writ of ſecond deliverance; which is a judicial writ, and iſſued out of the record of the replevin, in which the nonſuit was, and is to this purpoſe.

Reg. Jud. 58. 2 Inſt. 341.

"*Rex vicecomiti* E. *ſalutem: Si* A. *fecerit te, &c. et etiam de catallis retornandis, quæ* B. *in curiâ noſtrâ, &c. adjudicata fuerunt ob defaltam ipſius* A. *ſi retornum inde adjudicetur: tunc eidem* A. *averia et catalia prædicta ſine dilatione liberari facias, et pone, &c. prædictum* B. *&c.*"

"*George* the Third, *&c.* To the ſheriff of, *&c.* greeting: If *A.* ſhall make you, *&c.* as well of the cattle to be returned, which to *B.* in our court, *&c.* were adjudged by reaſon of the default of the ſaid *A.* if a return of them ſhould be adjudged, that you then cauſe the beaſts and cattle aforeſaid to be delivered without delay to the ſame *A.* and put, *&c.* the aforeſaid *B. &c.*"

2 Inſt. 341.

And by the above mentioned act, it is further provided, *quod ſi iterato ille qui replegiaverit averia, fecerit defaltam, vel alid occaſione*

occaſione adjudicetur retornum diſtrictionis, jam bis replegiatæ, remaneat diſtrictio illa in perpetuum irreplegiabilis. So that now if the plaintiff do not prevail in the writ of *ſecond deliverance*, but the defendant hath judgment, whether by the nonſuit of the plaintiff, by abatement of the writ, or by diſcontinuance of the plea, the return is awarded irrepleviſable; that is, the defendant ſhall detain the beaſts as a pledge until the rent or duty for which they were originally taken, be paid to the defendant; and the plaintiff ſhall never be admitted to diſturb the defendant's poſſeſſion, by replevin or writ of *ſecond deliverance*.

But if the plaintiff tender the rent for which the diſtreſs was originally taken, the defendant ought to reſtore the beaſts; and if he refuſes, the plaintiff may recover them by action of *detinue*: becauſe, notwithſtanding the judgment for return irrepleviſable, the beaſts ſtill remain as a pledge; and if the defendant refuſe to make reſtitution of the pledge upon tender of the rent, his detention then is unlawful, and the plaintiff may puniſh ſuch detention in an action of *detinue*. For though the return irrepleviſable prevents the bringing back of the pledge; yet it does not veſt the abſolute property thereof in the defendant, but only a qualified property until the rent is paid.

2 Inſt. 107. 341. Cro. Jac. 148.

The writ of *ſecond deliverance* is a *ſuperſedeas* in law to the ſheriff, to forbear to execute the writ *de retorno habendo*, obtained on the nonſuit of the plaintiff, if it comes to the ſheriff

2 Inſt. 341. Dyer 41.

ſheriff before return be made. If after return be made, it is in the nature of a new replevin, as appears by the form thereof beforementioned.

Latch. 72. Palm. 403. Salk. 95.

[But though the writ of *ſecond deliverance* is a *ſuperſedeas* of the writ *de retorno habendo*, yet it has been adjudged to be no *ſuperſedeas* of the writ of inquiry of damages upon the 21 *H.* 8. *c.* 19. for thoſe damages are not avowed for, but are given as a compenſation for the expence and trouble the avowant has undergone.

2 Wilſ. 116.

So it has been determined that the writ of ſecond deliverance is no *ſuperſedeas* of the writ of inquiry of damages upon the 17 *Car.* 2. *c.* 7. And therefore it ſhould ſeem that the writ of ſecond deliverance is in effect taken away, where the defendant proceeds upon that ſtatute, by writ of inquiry of damages, and does not purſue the common law judgment *de retorno habendo.*]

Ventr. 64.

2 Inſt. 341.

And the *ſecond deliverance* is always to bring back the ſame diſtreſs which was firſt taken by the defendant, and for which he hath already judgment for a return. So that if after the nonſuit, upon a *retorno habendo*, the ſheriff returns *elongata*, by means whereof the defendant hath other beaſts of the plaintiff delivered him *in withernam*, in this caſe, though there never was any return of the original diſtreſs made to the defendant, (becauſe they were eloigned by the plaintiff, ſo as the ſheriff could not make any return of them) yet the *ſecond deliverance* muſt go for the firſt diſtreſs,

diſtreſs, and the plaintiff muſt declare of THAT diſtreſs. For the writ of *ſecond deliverance* is a judicial writ, which iſſues out of the record of the FIRST replevin, and therefore cannot vary from the record out of which it iſſues; becauſe it ſeeks a deliverance of thoſe cattle which were formerly adjudged to the defendant on the plaintiff's nonſuit: and therefore *ex vi termini* this ſecond deliverance muſt be of the ſame beaſts, of which the firſt deliverance was made to the plaintiff by replevin. But it ſeems that after the ſecond deliverance purchaſed, the plaintiff may move the court for a reſtitution of the *withernam* beaſts.

Where the defendant puts in a plea to the writ of replevin, as property in a ſtranger, or in the defendant;—and theſe pleas diſ-affirming the property of the plaintiff, are by verdict found for the defendant, or upon demurrer adjudged for him; in theſe caſes the defendant ſhall have return irrepleviſable: for there could be no new replevin at common law, as upon a nonſuit, becauſe the Court had already given their judgment upon the legality of the caption. For if the property be in the defendant, or a ſtranger, the plaintiff could have no cauſe to complain; and therefore to grant a new replevin, or, which is the ſame thing, not to have made the return irrepleviſable, were to leave that ſame point open to an examination, which had already been determined; and no writ of ſecond deliverance can be given by the ſtatute, for that is only upon the plaintiff's nonſuit. Ld. Raym. 217.

But

Ante 168, 169. But if the defendant pleads property in the plaintiff and *J. S.* which only abates the writ under the preſent form; or pleads *cepit in alio loco*, which abates the count, and conſequently the writ; in theſe caſes, as there can be no return without an avowry, for reaſons already given; ſo that return cannot, in the nature of the thing, be irrepleviſable; becauſe theſe pleas, only abating the writ, muſt neceſſarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff, for the ſame beaſts which the Court hath returned to the defendant irrepleviſable. So if the plaintiff confeſſeth the plea of the defendant to be true, the defendant ſhall have return, but not irrepleviſable.

2 Inſt. 340. If the writ of replevin abate for any miſpriſion in the clerk, the defendant ſhall have no return at all; becauſe the plaintiff is in no default, but the officer: ſo that, after ſuch abatement of the writ, the plaintiff's poſſeſſion of the beaſts continues. And therefore it ſeems that the defendant, in this caſe, is driven to a new diſtreſs.

2 Inſt. 340. But if the writ abate by miſinformation, or other default of the plaintiff, the defendant ſhall have return of the beaſts, but not irrepleviſable; becauſe the defendant, by pleading to the writ, allows the plaintiff another writ, under another form.

2 Inſt. 340. The act which awards the return irrepleviſable, extends only to the king's SUPERIOR courts of juſtice. For the act directs, *quod attachietur ille qui diſtrinxit ad veniendum certum*

certum diem coram juſticiariis, coram quibus placitum deducatur in præſentiâ partium;— which words are to be underſtood of the king's juſtices in his ſuperior courts. For the judges of inferior courts, are looked upon as more ſubject to miſtake and partiality, and therefore not to be truſted with the power of awarding a return irrepleviſable, which is for ever to conclude the plaintiff. But it ſeems that where judgment was given upon verdict, and not upon nonſuit, the inferior courts could award a return irrepleviſable at common law.

We come now to ſhew what remedy the defendant hath when he cannot come at the beaſts, on the writ *de retorno habendo.*

It is already obſerved, that by the before mentioned act of *Weſt.* 2. *c.* 2. the ſheriff, before he executes the writ of replevin, is obliged to take from the plaintiff *non ſolum plegios de proſequendo, ſed etiam de averiis retornandis, ſi adjudicetur retornand'; & ſi quis alio modo plegios ceperit, reſpondeat ipſe de pretio averiorum, et habeat dominus diſtringens recuperare per breve quod reddat ei tot averia vel catalla, et ſi non habeat ballivus unde reddat, reddat ſuperior ſuus.* The method of proceeding upon this act is, that if the ſheriff by the writ *de retorno habendo* cannot find the original diſtreſs, but returns *elongata*, the defendant hath a *ſcire facias* to ſummon the perſons who became pledges for the plaintiff, at the execution of the original replevin, that the plaintiff would make return of the original diſtreſs, if return thereof ſhould be awarded. This *ſcire facias* brings the

2 Inſt. 338.

2 Inſt. 340.
3 Mod. 56, 37.

the pledges into court, and thereby gives them an opportunity to conteſt, why the defendant ſhould not have return of their beaſts, ſince the plaintiff's beaſts cannot be found, for whom they were pledges. If the pledges cannot ſhew cauſe, then the defendant hath A WRIT to have return of the beaſts of the pledges, inſtead of the plaintiff.

Raſt. 569. 570, which ſee.

Ld. Raym. 278. [But here it may be proper to obſerve, that the proceſs againſt the pledges in replevin, in ſuch courts as are not of record, is not properly a *ſcire facias*; for every *ſcire facias* ought to be grounded upon a record; but it is rather A PRECEPT in nature of a *ſcire facias*.]

2 Inſt. 340. Bro. Abr. tit. Retorn. des Avers, pl. 2. Dalt. Sher. 275. If the pledges prove inſufficient, ſo as the ſheriff can find none of their cattle, and thereby is obliged to return *nihil* on the writ iſſued againſt the beaſts of the pledges, the ſheriff himſelf, by the ſaid act, then becomes liable. And the defendant hath a *ſcire facias* grounded upon the ſaid act, *quod reddat ei* (the defendant) *tot averia* or *catalla*. [Or, in ſuch caſe, the defendant may proceed againſt the ſheriff by action on the caſe, for omitting to take pledges, or for taking ſuch as are inſufficient.]

Ld. Raym. 278.

Saunders v. Darling, N. P. T. 10 G. 3. C. B. Bull. Ni. Pri. 60. 5th edit. "In ſuch action againſt the ſheriff, ſome evidence muſt be given by the plaintiff of the inſufficiency of the pledges or ſureties, but very ſlight evidence is ſufficient to throw the proof on the ſheriff; for the ſureties being known to him, he is to take care that they are ſufficient."

But

[But it ſhould be remembered, that there is another act of Parliament relative to pledges in replevin; and that is the 11 *G.* 2. *c.* 19. which ordains, that "the ſheriff or other officer, granting a replevin, ſhall firſt take in his own name, from the plaintiff and two pledges, a bond in double the value of the goods diſtrained, conditioned for proſecuting the ſuit with effect and without delay, and for returning the goods, in caſe a return ſhall be awarded; which bond may be aſſigned to the avowant, who may bring an action thereupon in his own name."]

"A defendant in replevin is entitled to an aſſignment of the replevin bond, if the plaintiff in replevin does not appear in the county court, and proſecute according to the condition." Dias v. Freeman, 5 Term Rep. 195.

"And he may ſue on the bond as aſſignee of the ſheriff in the ſuperior courts, tho' the replevin is not removed out of the county court." Ibid.

"The court of *K. B.* will not grant an attachment againſt the ſheriff if he omits taking a replevin bond, becauſe the party injured may maintain an action againſt him for his neglect." Rex v. Lewis, 2 Term Rep. 617.

"And in an action againſt him for taking inſufficient pledges, the court of *K. B.* did not allow the plaintiff to recover damages beyond the value of the diſtreſs; becauſe if a return ſhould be awarded, the bond is ſatisfied by returning the goods taken." Yea v. Lethbridge, 3 Term Rep. 433.

Concannen v. Lethbridge, 2 H. Bl. 36.

"But in a ſimilar action, where it appeared that the ſheriff *clearly knew* the pledges to be inſufficient, the court of *C. B.* decided that the plaintiff might recover damages beyond the penalty of the replevin bond, *i. e.* more than double the value of the goods diſtrained, and the reaſon given was, becauſe it appeared to be a culpable neglect, and not merely a *non-feaſance*, but muſt have been accompanied with a bad intent; therefore that the rule in ſuch caſe muſt depend upon what damages the party ſuſtained; and as the 11 *G.* 2. *c.* 19. *ſ.* 23. had given an equitable juriſdiction to the Court to qualify the penalty, that it would not be agreeable to juſtice and reaſon, unleſs all that had been loſt by the proceeding was covered by the judgment."

"The high-ſheriff, under-ſheriff and replevin-clerk, (*i. e.* the officer appointed to make replevins under 1 *&* 2 *P. & M. c.* 12.) are anſwerable for the inſufficiency of the pledges *de retorno habendo* taken according to *Weſtm.* 2. *c.* 2. and 11 *G.* 2. *c.* 19. and each of them are bound to diſcover the names of the pledges to the defendant in replevin, in caſe he finds it neceſſary to ſue them on the bond, on account of ſuch inſufficiency."

"Thus where a replevin was brought for a diſtreſs taken for rent in which the defendant had a verdict with damages and coſts; an application was made to the Court for a rule on the replevin clerk, under-ſheriff and county clerk, to diſcover the names of the pledges *de retorno habendo*, becauſe on ſuing a writ of *de retorno habendo* irrepleviſable, the ſheriff returned an eloignment, and the replevin

Richards v. Acton, Bl. 1220.

plevin clerk had refuſed to give the names of the pledges; the Court after ordering the high ſheriff to be added, held that the high ſheriff and under-ſheriff, as well as the replevin clerk (who was their deputy) were anſwerable to the defendant in replevin for the inſufficiency of the pledges taken according to *Weſtm.* 2. *c.* 2. and 11 *G.* 2. *c.* 19 *ſ.* 23. and granted the rule againſt them, tho' they diſcharged the rule as to the county clerk."

[The mode of proceeding on 11 *G.* 2. *c.* 19. is generally now preferred to the old remedy by *ſcire facias*, where the replevin is upon a diſtreſs for rent. And it is not affected by the 17 *Car.* 2. *c.* 7. for where the avowant had judgment for want of a plea in bar, in purſuance of that ſtatute, it was held, that he had two methods of proceeding in his election; either to execute a writ of inquiry, or to ſue upon the replevin bond; the plaintiff not having proſecuted his ſuit with effect. 2 Wilſ. 42.

If the ſheriff upon a replevin take pledges *de retorno habendo*, and upon a return awarded return, *quod averia elongata ſunt*, and then a *ſcire facias* is brought againſt the pledges, and a *nihil* is returned, an action lies againſt the ſheriff; or, an action may be maintained againſt him, *upon ſuggeſtion* of this matter. 11 H. 6. 16. b.

From hence it ſhould ſeem that it is not neceſſary to ſue out a *ſcire facias* againſt the pledges, and to have it returned *nihil*, in order to ground an action againſt the ſheriff for their inſufficiency. And this opinion is authorized by the following determination.

Rous v. Patterſon, 16 Vin. Abr. 399.

An action on the caſe was brought againſt the ſheriff for taking inſufficient pledges upon a replevin, to which he pleaded Not guilty; and a verdict being found againſt him, judgment was given thereon in the court of *C. B.* A writ of error was brought in *B. R.* and it was objected, firſt, that an action on the caſe was not the proper remedy; and ſecondly, that ſuppoſing ſuch action lay, there ought to have been a *ſcire facias* firſt ſued out againſt the pledges. As to the firſt objection, the Court held that by the ſtatute of *Weſtm.* 2. the party diſtraining has an intereſt in the pledges, and if the ſheriff omits to take them, or, which is the ſame thing, takes inſufficient ones, the party is aggrieved, and conſequently is entitled to his action. And as to the ſecond objection, it was determined, that tho' a *ſcire facias* may be brought againſt the pledges, yet it does not follow from thence, that an action does not lie againſt the ſheriff, without firſt bringing a *ſcire facias* againſt the pledges. For tho' ſome books (2 *Inſt.* 340. *F. N. B.* 74. *F. Bro. ſci. fa.* 3. *Raſt.* 569. *b. Co. Ent.* 637. *Skin.* 244.) mention ſuch a previous ſtep, yet, as the ſtatute does not direct it, and as no caſe declares it to be neceſſary, it would be hard to require ſuch a circuitous mode of proceeding: and therefore the judgment of *C. B.* was affirmed.]

So that the defendant is now ſecured againſt the danger he was expoſed to at common law, which was, that the plaintiff who had the poſſeſſion of the diſtreſs reſtored to him by the execution of the replevin, would often ſell

ſell or diſpoſe of them pending the ſuit; and ſo the defendant, though he had judgment, loſt the fruits of it.

There is another remedy for the defendant where the ſheriff returns *elongata* on the writ *de retorno habendo*, and that is by *withernam* againſt the plaintiff's beaſts (*a*); but this has been already mentioned, and diſcuſſed.

VIII. Of the Writ of Recaption.

It is already obſerved, that where the defendant hath judgment upon his avowry in replevin, he ſhall have reſtitution of the beaſts, to detain them as a pledge, until the rent or duty for which they were taken be paid or ſatisfied; and ſince he hath got ſecurity to have return upon making out the juſtice of his firſt caption, it is highly reaſonable, that pending that ſuit, the tenant ſhould be protected from farther diſtreſſes for the ſame rent or cauſe for which the firſt diſtreſs was taken. For this purpoſe the writ of recaption was framed; in which, if the defendant be convicted, he ſhall be fined to the king; becauſe by the ſecond caption the defendant takes upon him to determine the juſtice and legality of the F. N. B. 71. E.

(*a*) If the plaintiff becomes a bankrupt, and the aſſignees ſell the goods, the defendant cannot after judgment bring an action againſt them, as for money had or received, but he may take out a *retorno habendo*, and on an *elongata* returned, a *capias in withernam*, or he may proceed againſt the plaintiff and his ſureties, and if they are inſolvent, againſt the ſheriff. Bradyll v. Ball, 1 Bro. C. C. 427. Cooke's Bank. Laws 218.

firſt, while that very point is under the conſideration of the court of juſtice in which the replevin depends. For if the firſt diſtreſs were lawful, he ſhall have return of it, and therefore the ſecond is unreaſonable; if the firſt were unlawful, much more ſo is the ſecond taking for the ſame cauſe; ſo that the recaption lies even where the cauſe of the firſt caption was juſt.

F. N. B. 71. E. But it ſeems that if *A.* diſtrains beaſts *damage feaſant*, and pending that ſuit, the ſame cattle or other cattle of the ſame proprietors, treſpaſs on the ſoil of *A.*—*A.* may diſtrain again pending the firſt ſuit; becauſe each diſtreſs is for a DISTINCT and SEVERAL treſpaſs or injury, for which *A.* is entitled to ſatisfaction. The reſtitution of the cattle for the firſt treſpaſs will be no compenſation for the ſecond treſpaſs, ſince *A.* cannot legally with-hold them as a pledge for ſatisfaction of a ſecond treſpaſs, when the firſt is ſatisfied.

Id. 72. D. [And if a plaint be removed out of the county into the common pleas by *pone* or *recordari*, and afterwards the plaintiff be nonſuit in the common pleas, before or after an avowry made, the lord after this nonſuit may diſtrain again for the ſame cauſe, and the tenant ſhall not have a recaption, becauſe there is not any plea depending; and yet the plaintiff may ſue a writ of ſecond deliverance upon the ſame record.]

F. N. B. 72. B. The deſign then of the writ of recaption being to prevent a ſecond diſtreſs for the SAME rent or duty, it follows that the defendant

dant cannot avow as in replevin, becauſe the avowry is in order to have a return of the pledges; but in recaption, whether the firſt diſtreſs were juſt or unlawful, the defendant cannot have return of the beaſts under the notion of the pledge; for that were to invert the deſign of the law, by allowing the defendant a ſecond diſtreſs, by judgment upon that very writ, which was framed to puniſh the perſon taking a ſecond diſtreſs, for the ſame thing.

In the writ therefore of recaption, the defendant muſt JUSTIFY as in treſpaſs; becauſe ſince he cannot avow the taking under the notion of a pledge for a rent or duty, (inaſmuch as he hath already a pledge for that, which will be returned to him, if in the event of the ſuit in replevin the rent appears to be in arrear) he muſt therefore be looked upon as a treſpaſſer, unleſs he can juſtify the taking for ANOTHER cauſe And his defence muſt be thus;—*defendit vim & injuriam quando*, &c. *& quicquid eſt in contemptum domini regis & ejus mandati* (*a*). F. N. B. 72. B. 29 E. 3. 28.

Hence it is, that there are no pledges *de retorno habendo* taken from the plaintiff, as in the replevin; becauſe tho' the deliverance of the beaſts to the plaintiff be immediate, as in the replevin, yet the defendant can have no return. For if the rent or duty was un-

(*a*) For the plaintiff ſhall not recover damages for the taking or detaining of his cattle, but only damages for the defendant's contempt againſt Law. 1 Rol. 320. l. 10. 5 Com. Dig. (3 K.) 32. 305.

paid, for which the diſtreſs was taken, the defendant will have reſtitution of his firſt diſtreſs; which being to remain in his hands till the rent be paid, there is no reaſon for the reſtitution of the ſecond diſtreſs; and conſequently no occaſion for the pledges *de retorno habendo*, as in the original replevin.

F. N. B. 72. G. And here it is not neceſſary to entitle a man to the writ of recaption, that the SAME BEASTS or cattle be taken the ſecond time, which were firſt taken; but only that the cattle or beaſts of the SAME PERSON were diſtrained for the SAME RENT or duty; for the injury is the ſame to the plaintiff in replevin, whether the firſt diſtreſs be again taken, or any other goods or cattle of the plaintiff, and the writ of recaption is to puniſh the injury.

F. N. B. 71. H. But if the lord diſtrains the beaſts of his tenant for rent, and afterwards diſtrains the beaſts of *J. S.* a ſtranger, being on the land, for the ſame rent; in this caſe no writ of recaption lies for this ſecond diſtreſs; not for the tenant, becauſe the ſecond diſtreſs is not of the tenant's beaſts;—nor for *J. S.* becauſe the beaſts of *J. S.* were not formerly taken, and therefore *J. S.* muſt take out an original replevin, or bring his action of treſpaſs, as he thinks fit.

F. N. B. 71. F. Yet if the lord diſtrains his tenant, and pending that plea, commands his ſervant to diſtrain the tenant again, for the SAME rent, the tenant ſhall have a recaption againſt the lord himſelf for the ſecond diſtreſs; becauſe the ſecond diſtreſs is eſteemed in law to be

taken by the lord himſelf, according to the rule *qui facit per alium, faciat per ſe ipſum.* So if the ſervant had taken the ſecond diſtreſs without the lord's command, yet if the lord had afterwards, by any ſubſequent act, agreed to the taking of the ſecond diſtreſs, as by joining in *aid* with the ſervant to defend the juſtice of the caption;—ſuch ſubſequent agreement makes it a diſtreſs of the lord, and to have been taken in his right *ab initio.* For *omnis ratihabitio mandato æquiparatur*; and a parol agreement of the lord to the ſecond diſtreſs ſeems ſufficient.

But if there be no ſuch command, or ſubſequent agreement of the lord, the tenant ſhall have no recaption either againſt the lord or the ſervant, though the ſervant makes conuſance of the ſecond diſtreſs in right of his lord, and for the ſame rent for which the lord took the firſt diſtreſs: for the writ of recaption is to puniſh the ſecond caption, only where it is wilfully made by the SAME perſon that made the firſt, or by another under his direction or authority; and it may be, that the lord and his ſervant had not notice of each other's caption.

So that where there is is no precedent command, nor a ſubſequent agreement of the lord to the ſecond caption, the tenant is left to his action of treſpaſs againſt the ſervant; becauſe the ſecond caption is a violation of property, and unlawful, tho' the rent be in arrear; ſince the lord, by the firſt diſtreſs hath taken a pledge for his rent, which will be returned to him, if in the event of F. N. B. 71. C.

the ſuit in replevin, the tenant be found to be in arrear.

F. N. B. 71. I. 72. E. If the lord diſtrains the beaſts of *A.* and *B.* for rent, and for the ſame rent diſtrains a ſecond time the beaſts of *A.* only, *A.* ſhall have a writ of recaption againſt the lord; becauſe there is a diſtreſs of *A.* already for that rent, which the lord will have a return of, if the rent be found in arrear. But if the firſt diſtreſs had been only of *A.* the tenant, and the ſecond diſtreſs had been the cattle of *A.* and of *B.* a ſtranger, which they have in common, *Fitzherbert* makes a doubt whether *A.* in this caſe ſhall have a recaption, becauſe of *B.*'s intereſt in the cattle; for it is plain *B.* cannot join in the recaption, becauſe his beaſts were never diſtrained before.

F. N. B. 71. M. If the lord diſtrains his tenant, and he replevies, and the lord avows for rent, and the tenant pleads *rien arrear*, or levied by diſtreſs, and pending this ſuit other rent becomes due, the lord may diſtrain again the beaſts of the tenant for the laſt rent incurred, and no writ of recaption lies for the tenant; becauſe theſe diſtreſſes are for two diſtinct cauſes. But if the tenant had pleaded to the avowry in the firſt replevin, *hors de ſon fee*, and pending that ſuit the lord had diſtrained again for another half year's rent, the tenant ſhould have a writ of recaption; becauſe by the plea of *hors de ſon fee* the lord's title to the rent itſelf, and not to this or that particular arrear, is in diſpute, and that title may be determined by the firſt caption;

tion; and therefore the ſecond diſtreſs being unneceſſary to try the title to the rent, the writ of recaption lies to prevent it, and puniſh the lord for taking the ſecond diſtreſs, and to protect the tenant from ſuch oppreſſion.

And this writ of recaption lies for the tenant before avowry made by the lord in the firſt replevin; for otherwiſe the remedy would not be adequate, becauſe the lord might harraſs the tenant by ſeveral diſtreſſes, before the lord, by the rules of the court, could be compelled to avow. But then the tenant muſt, in his declaration on the recaption, aver that the ſecond diſtreſs was taken for the ſame cauſe as the firſt; otherwiſe the tenant fails in making out to the Court his title to the writ of recaption, and conſequently cannot puniſh the lord for taking the ſecond diſtreſs. F. N. B. 72. A.

[And a recaption lieth as well where the plea is depending in the county before the ſheriff, as where it is depending before juſtices of record.] F. N. B. 72. G.

APPENDIX.

PRECEDENTS of PLEADINGS in REPLEVIN.

THE king, &c. We command you that juſtly and without delay you cauſe to be replevied the cattle of *B.* which *D.* took and unjuſtly detains, as it is ſaid, and afterwards thereupon cauſe him juſtly to be removed, that we may hear no more clamour thereupon for want of juſtice, &c. Writ of replevin.

A. B. complains againſt *C. D.* in a plea of taking and unjuſtly detaining his cattle againſt ſureties and pledges, &c. Plaint.

Pledges to proſecute, { *E. F.* and *G. H.*

Walker

Walker *againſt* Towerſy and others.

M. 9 *W.* 3. *Roll.* 48.

Declaration. Pract. Reg. 157.

Midd', to wit, JOHN *Towerſy*, *Robert Wheeler* and *William Stubbins* were ſummoned to anſwer to *Thomas Walker* in a plea, why they took a ſilver porrenger of the ſaid *Thomas* and unjuſtly detained it, againſt ſurety and pledges until, *&c.* And whereon the ſame *Thomas* by *J. L.* his attorney complains that the ſaid *John*, *Robert* and *William*, on the firſt day of *May* in the 9th year of the reign of the Lord *William* the Third, now king of *England*, *&c.* in the *Charter houſe* in the county of *Middleſex* aforeſaid, in a certain place there called the *dwelling-houſe* of him the ſaid *Thomas*, took the ſaid porrenger of him the ſaid *Thomas*, and unjuſtly detained it, againſt ſurety and pledges until, *&c.* whereby the ſame *Thomas* ſays that he is prejudiced, and hath damage to the value of 30 *l.* And therefore he produces the ſuit, *&c.*

Cogniſance by overſeers for a poor's rate.

And the ſaid *John*, *Robert* and *William*, by *R. H.* their attorney come and defend the force and injury when, *&c.* and well acknowledge the taking of the porrenger aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe they ſay, that at the ſaid time when, *&c.* the ſame *John* and *Robert*, being overſeers of the poor of the pariſh of St. *Sepulchre* in the county of *Middleſex*, by virtue of a certain warrant under the hands and ſeals of *William Withers*,

thers, Eſq; and *Thomas Smith*, Eſq; then two of the juſtices of the lord the now king, aſſigned to preſerve the peace in the county aforeſaid (*quorum unus*) to the warden of the church and the overſeers of the poor of the ſame pariſh, or any of them, directed, at the ſaid place in which, *&c.* demanded of the ſaid *T. Walker* to pay them 10*s.* 6*d.* of lawful money upon him duly aſſeſſed towards the relief of the poor of the pariſh aforeſaid, by the authority aud according to the tenor, purport and effect of a certain ſtatute made and provided in a parliament of the lady *Elizabeth*, late queen of *England*, &c. held at *Weſtminſter* in the county of *Middleſex* in the 43d year of her reign; and becauſe the ſame *Thomas* then and there refuſed to pay the ſaid 10*s.* 6*d.* to them the ſaid *John* and *Robert*, they the ſame *John* and *Robert*, as overſeers of the poor aforeſaid, and the ſaid *William* at their requeſt and in their aid, for the preſervation of the peace of the ſaid lord the king, (the ſame *William* being then a conſtable within the pariſh aforeſaid) by virtue of the ſtatute and warrant aforeſaid well acknowledge the taking of the porrenger aforeſaid, the ſaid time when, *&c.* in the ſaid place in which, *&c.* in the name of a diſtreſs for the ſaid 10*s.* 6*d.* upon him the ſaid *T. Walker* as aforeſaid aſſeſſed towards the relief of the poor of the pariſh aforeſaid, then being in arrear and unpaid, and juſtly, *&c.* And this they are ready to verify: wherefore they pray judgment, and a return of the porrenger aforeſaid, to be adjudged to them, *&c.*

43 Eliz. c. 2. §. 19.

And

Repl. *De injuria ſua propria.*

And the ſaid *Thomas* ſays, that the ſaid *John*, *Robert* and *William*, by the reaſon before alledged, the taking of the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* ought not to acknowledge juſt, becauſe he ſays, that the ſaid *John*, *Robert* and *William*, the day and year aforeſaid in the declaration aforeſaid mentioned, of their own wrong, without ſuch cauſe by them in their cogniſance aforeſaid above mentioned, the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* took and unjuſtly detained, againſt ſurety and pledges, *&c.* in manner and form as the ſaid *Thomas* above againſt them complains; and this he prays may be inquired of by the country: and the ſaid *John*, *Robert* and *William* likewiſe, *&c.* Therefore, *&c.*

Croſſe againſt *Bilſon.*

Declaration, for taking a mare in the highway. Salk. 3. Pract. Reg. 157.

North'ton, to wit. *JOHN Bilſon* was ſummoned to anſwer to *Samuel Croſſe* in a plea, why he took a mare of him the ſaid *Samuel* and unjuſtly detained it, againſt ſurety and pledges, *&c.* And whereon the ſame *Samuel* by *W. L.* his attorney complains, that the ſaid *John* on the firſt day of *October* in the 12th year of the reign of the lord *William* the Third, late king of *England*, &c. at *Hardingſton* in the county aforeſaid, in a certain place there called the *king's highway*, a mare of him the ſaid *Samuel* took and unjuſtly detained it, againſt ſurety and pledges, until, *&c.*

&c. whereby the ſame *Samuel* ſays that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the ſuit, *&c.*

Cogniſance for damage feaſant.

And the ſaid *John Bilſon* by *J. B.* his attorney comes and defends the force and injury when, *&c.* and as bailiff of the moſt noble *William* lord *Leimpſter* well acknowledges the taking of the mare aforeſaid the ſaid time when, *&c.* in a certain place called the *queen's highway*, and juſtly, *&c.* becauſe he ſays, that the ſaid place contains, and the ſaid time when, *&c.* did contain in itſelf, half a rod of land with the appurtenances in *Hardingſton* aforeſaid: which ſaid half rod of land long before and the ſaid time when, *&c.* was parcel of a certain ancient meſſuage in *Hardingſton* aforeſaid; which ſaid meſſuage long before, and the ſaid time when, *&c.* was the ſoil and freehold of the ſaid lord *Leimpſter*; and becauſe the mare aforeſaid the ſaid time when, *&c.* was in the ſaid half rod of land in which, *&c.* doing damage there, the ſaid *John*, as bailiff of the ſaid *William* lord *Leimpſter*, well acknowledges the taking of the mare aforeſaid, in the place in which, *&c.* and juſtly, *&c.* doing damage there, *&c.* without that, that the ſaid *John* took the mare aforeſaid in a certain place called the *king's highway*, as the ſaid *Samuel* againſt him hath declared: and this he is ready to verify: wherefore he prays judgment, and a return of the mare aforeſaid, to be adjudged to him, *&c.*

And

Plea in maintenance of the declaration.

And the ſaid *Samuel* ſays, that the ſaid *John Bilſon*, as bailiff of the moſt noble *William* lord *Leimpſter*, the taking of the mare aforeſaid ought not to acknowledge juſt, becauſe he ſays, that he the ſaid *John Bilſon* the ſaid time when, *&c.* took the mare aforeſaid in the ſaid place then called the *king's highway*, in manner and form as the ſaid *Samuel* above by declaring hath alledged: and this he prays may be inquired of by the country.

Demurrer.

And the ſaid *John* ſays, that he to the plea of the ſaid *Samuel* above in replying pleaded hath no neceſſity, nor is by the law of the land obliged in any manner to anſwer, becauſe he ſays, that the ſame plea is not ſufficient in law to maintain his declaration aforeſaid: and this he is ready to verify: wherefore for want of a ſufficient replication in this behalf the ſame *John* as before prays judgment, and that the declaration aforeſaid may be quaſhed.

Joinder.

And the ſaid *Samuel*, for that he hath above alledged ſufficient matter in law for him the ſaid *Samuel* to maintain his action and declaration aforeſaid, which he is ready to verify, which ſaid matter the ſaid *John* doth not deny, nor to the ſame in any wiſe anſwer, but that averment hath altogether refuſed to admit, prays judgment, and his damages by reaſon of the taking and unjuſt detention of the mare aforeſaid, to be adjudged to him, *&c.* And becauſe the juſtices here will adviſe themſelves of and upon the

1 Sid. 189, 190. 1 Vent. 135, 136. Cro. El. 202.

the premiſſes before they give judgment thereon, day is given to the parties aforeſaid here until from the day of St. *Michael* in three weeks to hear their judgment thereon, becauſe the ſame juſtices here thereof not yet, &c. On which day here comes as well the ſaid *Samuel* as the ſaid *John* by their attornies aforeſaid; and hereupon the premiſſes being ſeen, and by the juſtices here more fully underſtood, it ſeems to the ſame juſtices here, that the plea of the ſaid *Samuel* above in replying pleaded is ſufficient in law to maintain his declaration aforeſaid, as the ſaid *Samuel* hath above alledged; wherefore the ſaid *Samuel* ought to recover his damages by reaſon of the premiſſes againſt the ſaid *John:* but becauſe it is unknown what damages the ſaid *Samuel* hath ſuſtained by reaſon of the premiſſes, the ſheriff is commanded, that by the oath of twelve good and lawful men of the county aforeſaid he diligently inquire what damages the ſaid *Samuel* hath ſuſtained, as well by reaſon of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended; and the inquiſition which he ſhall thereof make, certify here on the octave of St. *Hilary* under the ſeal, &c. and the ſeals, &c. On which day here comes the ſaid *Samuel* by his attorney aforeſaid; and the ſheriff, to wit, *Cæſar Child*, Bart. hath now returned here a certain inquiſition taken before him at the town of *North'ton* in the county aforeſaid on the 19th day of *January* laſt paſt by the oath of twelve, &c. whereby it is found that the ſaid *Samuel* hath ſuſtained damages by reaſon of the premiſſes, beſides his coſts

Cro. El. 202.

Judgment for the plaintiff.

Inquiry awarded.

and charges by him about his ſuit in this behalf expended, to 80 *s.* and for thoſe coſts and charges to 2 *d.* Therefore it is conſidered, that the ſaid *Samuel* do recover againſt the ſaid *John* his damages aforeſaid to 80 *s.* and 2 *d.* by the inquiſition aforeſaid in form aforeſaid found, and alſo 12 *l.* 17 *s.* 4 *d.* to the ſaid *Samuel* at his requeſt for his coſts and charges aforeſaid, by the court here of increaſe adjudged: which ſaid damages in the whole amount to 16 *l.* 17 *s.* 6 *d.* And the ſaid *John* in mercy, *&c.*

Final judgment.

Afterwards, to wit, on day next after in this ſame term, before the lady the queen at *Weſtminſter* comes the ſaid *John* by *A. M.* his attorney, and ſays, that in the record and proceedings aforeſaid, and likewiſe in the rendition of the judgment aforeſaid, there is manifeſt error, in this, to wit, that by the record aforeſaid it appears that the judgment aforeſaid, in form aforeſaid given, was given for the ſaid *Samuel Croſſe* againſt him the ſaid *John Bilſon*; when, by the law of the land of this kingdom of *England*, judgment in the plea aforeſaid ought to have been given for the ſaid *John* againſt the ſaid *Samuel:* there is error alſo in this, to wit, that by the record aforeſaid it appears that the ſaid *John* was ſummoned to anſwer to the ſaid *Samuel* in the plea aforeſaid; yet no original writ between the parties aforeſaid, in the plea aforeſaid, is filed of record, nor remains of record in the ſaid court of the lady the queen of the bench; therefore in that there is manifeſt error: there is error alſo in this, to wit, that

General errors aſſigned.

No original.

No warrant of attorney.

that by the record aforeſaid it appears that the ſaid *Samuel*, in the ſaid court of the lady the ſaid queen of the bench, came and appeared by *W. L.* his attorney; yet the ſaid *W. L.* had no warrant of attorney of record by writ of the now lady the queen, nor without writ, to warrant his appearance for the ſame *Samuel* in the plea aforeſaid: there is error alſo in this, to wit, that by the record aforeſaid it appears, that the ſaid *John*, in the ſaid court of the ſaid lady, the now queen of the bench, appeared by *William Marriot* his attorney; nevertheleſs *W. M.* had no warrant of attorney of record by writ of the lady the queen, nor without writ, to warrant his appearance for the ſaid *John* in the plea aforeſaid: and the ſame *John* prays ſeveral writs of the lady the queen, to wit, one to the chief juſtice of the ſaid lady the queen of the bench, and another writ to the *cuſtos brevium* of the ſaid lady the queen of the bench aforeſaid to be directed, to certify the ſaid lady, the now queen, more fully the truth thereof: and to him they are granted, *&c.* Whereupon *Tueſday* next, after 15 days of the *Holy Trinity*, is given by the court of the ſaid lady the queen now here, to return to the court of the ſaid lady the queen, before the queen herſelf at *Weſtminſter*, the ſaid ſeveral writs of *certiorari* above prayed: the ſame day is given to the ſaid *Samuel* there, *&c.* And the ſaid chief juſtice of the bench aforeſaid, and the ſaid *cuſtos brevium* of the ſaid lady the now queen, on that day have not, nor hath either of them returned the ſeveral writs aforeſaid, neither have they, or either of them, done

Several *certioraries* prayed.

Rule to return them.

No error.

any thing therein: and hereupon the ſaid *Samuel* freely here into court comes and ſays, that there is no error either in the record and proceedings aforeſaid, or in the rendition of the judgment aforeſaid; and prays that the court of the ſaid lady the queen, now here, may proceed to the examination as well of the record and proceedings aforeſaid, as of the matters aforeſaid above for error aſſigned, and that the judgment aforeſaid may be in all things affirmed: but becauſe the court of the ſaid lady the queen, now here, are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid, before the lady the queen, until in a month of St. *Michael* whereſoever, *&c.* to hear their judgment thereon; becauſe the court of the ſaid lady the queen how here thereof not yet, *&c.* On which day, before the lady the queen at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid; whereupon as well the record and proceedings aforeſaid, and the judgment on the ſame given, as the ſaid cauſes and matters above for error aſſigned and alledged, being ſeen, and by the court of the ſaid lady the queen now here more fully underſtood and diligently examined, becauſe it ſeems to the court of the ſaid lady the queen here, that the judgment aforeſaid is in nothing vitious or defective, and that there is no error in that record; it is conſidered, that the judgment aforeſaid be in all things affirmed, and remain in its full force and effect, the ſaid cauſes above for error aſſigned in any wiſe notwithſtanding, *&c.* And it is further

Judgment affirmed.

ther conſidered by the ſame court, that the ſaid *Samuel* do recover againſt the ſaid *John* 12*l.* to the ſame *Samuel* by the court of the ſaid lady the queen now here by his aſſent adjudged, according to the form of the ſtatute thereof lately made and provided, for his coſts, charges and damages, which he hath ſuſtained by reaſon of the delay of execution of the judgment aforeſaid, on pretence of proſecuting the ſaid writ of the lady the queen to correct error of and upon the premiſſes; and that the ſame *Samuel* may have thereof his execution, *&c.* 7 H. 7. c. 10.

Hubbard againſt *Handford.*

Midd', to wit. *Richard Handford* was ſummoned to anſwer to *Richard Hubbard*, in a plea, why he took the goods and chattels of him the ſaid *Richard Hubbard*, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* And whereon the ſame *Richard Hubbard* by *J. P.* his attorney complains, that the ſaid *Richard Handford* on the 7th day of *October* in the 2d year of the reign of the lord and lady *William* and *Mary*, now king and queen of *England*, *&c.* at the pariſh of St. *Margaret Weſtminſter* in the county aforeſaid, in a certain place thete called *Peter ſtreet*, took the goods and chattels following, to wit, one jack, two ſpits, 18 pewter plates, *&c.* (*reciting ſeveral other particulars*) of the ſaid *Richard Hubbard*, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* Declaration. Replevin in K. B.

whereby the ſame *Richard Hubbard* ſays, that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the ſuit, *&c.*

And the ſaid *Richard Handford* by *J. L.* his attorney comes and defends the force and injury, when, *&c.* and well avows the taking of the goods and chattels aforeſaid, in the ſaid place where, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, where the taking of the goods and chattels aforeſaid is ſuppoſed to be, contains, and at the ſame time when the taking of thoſe goods and chattels is ſuppoſed to be, did contain in itſelf, a certain piece or parcel of land, with the appurtenances, in a place called *Peter-ſtreet*, otherwiſe *Bowling-alley*, in the pariſh of St. *Margaret Weſtminſter* aforeſaid, in the county aforeſaid; of which ſaid piece or parcel of land, with the appurtenances, one *Robert Marſham*, knt. before the ſaid time when, *&c.* was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, the ſaid *Robert*, before the ſaid time when, *&c.* to wit, on the 16th day of *May*, in the firſt year of the reign of the lord and lady the now king and queen, at the pariſh of St. *Margaret Weſtminſter* aforeſaid, in the county aforeſaid, demiſed the ſame piece or parcel of land, with the appurtenances, to the ſaid *Richard Handford*, to hold to the ſame *Richard* and his aſſigns from the feaſt of the Bleſſed Virgin *Mary* then laſt paſt before the date of the ſame demiſe, for the term of 51 years from thence next enſuing, and fully to be compleat

Sir *Robert Marſham* ſeiſed in fee of the place where, *&c.* demiſed it to the defendant for 51 years,

pleat and ended: by virtue of which ſaid demiſe the ſaid *R. Handford* was poſſeſſed of the ſame piece or parcel of land for the term aforeſaid; and ſo being thereof poſſeſſed, the ſame *R Handford*, afterwards, and before the ſaid time when, *&c.* had erected and built the ſaid meſſuage or tenement on the piece or parcel of land aforeſaid, and was thereof poſſeſſed; and being ſo thereof poſſeſſed, he the ſame *Richard Handford*, before the ſaid time when, *&c.* to wit, on the 20th day of *December*, in the firſt year of the reign of the ſaid lord and lady the now king and queen aboveſaid, demiſed the meſſuage aforeſaid, with the appurtenances, to the ſaid *Richard Hubbard* from the feaſt of the birth of our Lord then next following for the term of one whole year from thence next enſuing fully to be compleat and ended; yielding therefore for the ſame year to the ſaid *Richard Handford*, or his aſſigns, the rent of 15 *l.* of lawful money of *England*, at the four moſt uſual feaſts in the year, to wit, the feaſts of the annunciation of the Bleſſed Virgin *Mary*, St. *John* the baptiſt, St. *Michael* the archangel, and the birth of our Lord, by even and equal portions: by virtue of which ſaid demiſe the ſaid *Richard Hubbard* into the meſſuage aforeſaid with the appurtenances entered and was thereof poſſeſſed, and the ſame meſſuage with the appurtenances for the ſpace of three quarters of a year occupied; and becauſe the ſum of 11 *l.* 5 *s.* of the rent aforeſaid, after the demiſe ſo made for the ſaid three quarters of a year at the feaſt of St. *Michael* laſt paſt, and before

who demiſed it to the plaintiff for a year at 15 l.

and for three quarter's rent arrear diſtrained.

the taking of the goods and chattels aforeſaid, were to the ſame *Richard Handford* in arrear and unpaid, the ſame *Richard Handford* well avows the taking of the goods and chattels aforeſaid in the ſaid place, where, *&c.* and juſtly, *&c.* for the ſaid 11 *l.* 5 *s.* to the ſame *Richard Handford* in form aforeſaid being in arrear, as in the meſſuage aforeſaid, with the appurtenances, to the diſtreſs of the ſaid *Richard Handford* in form aforeſaid charged and bound: and this he is ready to verify: wherefore he prays judgment, and a return of the goods and chattels aforeſaid, to be adjudged to him.

Repl' that the rent was not in arrear.

And the ſaid *R. Hubbard* ſays, that the ſaid *R. Handford* for the reaſon before alledged ought not to avow the taking of the goods and chattels aforeſaid in the ſaid place, where, *&c.* juſt, becauſe he ſays, that the ſaid 11 *l.* 5 *s.* of the rent aforeſaid at the ſaid time, when, *&c.* were not in arrear and unpaid to the ſaid *Richard Handford*, nor was any penny thereof at the ſaid time, when, *&c.* in arrear to the ſaid *Richard Handford*, as the ſaid *Richard Handford* in his avowry aforeſaid hath above alledged: and this he prays may be inquired of by the country: and the ſaid *Richard Handford* likewiſe, *&c.* Therefore the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen, from the day of the *Holy Trinity* in three weeks, whereſoever, *&c.* 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid, *&c.* On which day before

Iſſue.

before the lord and lady the king and queen at *Weſtminſter* come the parties aforeſaid, by their attornies aforeſaid; and the ſheriff hath not returned the writ, nor done any thing therein; therefore, as before, the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen from the day of St. *Michael* in three weeks, whereſoever, *&c.* 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid, *&c.*

Legg againſt *Stephens and Others.*

Glouceſter to wit. *Thomas Stephens*, Eſq; *Robert Parker*, Eſq; and *Richard Broke*, were ſummoned to anſwer to *Nicholas Legg* in a plea, why they took the cattle of him the ſaid *Nicholas*, and unjuſtly detained, againſt ſurety and pledges, until, *&c.* And whereon the ſame *Nicholas* by *P. Hodges* his attorney, complains, that the ſaid *Thomas*, *Robert*, and *Richard*, on the tenth day of *November* in the 32d year of the reign of the lord *Charles* the Second, now king of *England*, *&c.* at the pariſh of *Old Sodbury* in the county aforeſaid, in a certain place there called the *Stub Riding*, took the cattle, to wit, two oxen, of him the ſaid *Nicholas*, and unjuſtly detained them againſt ſurety and pledges, until, *&c.* whereby the ſame *Nicholas* ſays, that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the ſuit, *&c.* Declaration.

And

Avowry for a diſtreſs for an amercement at a leet.

And the ſaid *T. Stephens*, *R. Parker*, and *R. Broke*, by *T. Edwards* their attorney come and defend the force and injury, when *&c.* and the ſaid *T. Stephens* and *R. Parker* well avow, and the ſaid *Richard*, as bailiff of the ſaid *T. S.* and *R. P.* well acknowledge the taking of the cattle aforeſaid, in the ſaid place, where, *&c.* and juſtly, *&c.* becauſe they ſay, that the ſame place, where the taking of the cattle aforeſaid is ſuppoſed to be, doth contain, and at the ſaid time when the taking of thoſe cattle is ſuppoſed to be, did contain in itſelf eighty acres of meadow with the appurtenances, called *Stub Riding*, ſituate in the pariſh of *Old Sodbury*, and then, and from time immemorial was, and yet is parcel of the manor and within the manor of *Old Sodbury* in the county aforeſaid, and within the juriſdiction of the court leet and view of frankpledge within ſpecified; and that long before the ſaid time when, *&c.* to wit, on the 10th day of *March* in the 32d year of the reign of the ſaid lord the now king, and long before the ſaid *T. S. R. P.* and one *J. Neal* late of *Deane* in the county of *Bedford*, Eſq. were jointly ſeiſed of and in the ſaid manor of *Old Sodbury* aforeſaid, with the appurtenances, ſituate within the pariſh of *Old Sodbury* aforeſaid, in their demeſne as of fee; and that at the ſaid time when, *&c.* the ſaid *N. Legg* was and yet is occupier of the ſaid cloſe called *Stub Riding*, and that the ſaid *T. S. R. P.* and *J. N.* and all thoſe whoſe eſtate the ſame *T. R.* and *J.* have in the ſame manor, with the appurtenances, from time immemorial have had, and been accuſ-

Seiſin.

Preſcription.

accuſtomed to have, within the manor aforeſaid, a certain court of view of frankpledge, and all things which to a court of view of frankpledge belong, of all the inhabitants and reſiants within the manor aforeſaid twice a year, to wit, once within a month next after the feaſt of *Eaſter*, and again within a month next after the feaſt of St. *Michael* the Archangel, before their ſteward of that court for the time being, within that manor yearly to be held, as to the ſaid manor, with the appurtenances belonging and appertaining: and the ſaid *Thomas*, *Robert* and *Richard* farther ſay, Court-leet. that before the ſaid time when, *&c.* to wit, at a court of view of frankpledge of the ſaid *Thomas*, *Robert* and *John*, held at *Old Sodbury* aforeſaid, within the manor aforeſaid, within a month next after the feaſt of *Eaſter*, to wit, on the 19th day of *April*, in the 32d year of the reign of the ſaid lord the now king of *England*, *&c.* before *T. Edwards*, being then ſteward of the ſaid *T. Stephens*, *R. Parker* and *J. Neale*, of the court of view of frankpledge, by the oath of 12 free and lawful men within the pariſh aforeſaid reſiant and inhabiting, then and there to inquire and preſent thoſe things which to the court leet and view of frankpledge aforeſaid then belonged, then in the ſame court being charged and ſworn, then and there in the ſame court it was preſented, among other things, that the ſaid *Nicholas Legg* the now plaintiff, then and Preſentment. for three months then laſt paſt being occupier of the ſaid cloſe called the *Stub Riding* within the juriſdiction of that court, had not opened

opened the king's highway, being with
the precinct of the manor aforeſaid, an
within the precinct of the leet aforeſai
and the juriſdiction of the ſaid court
view of frankpledge, leading from the p
riſh of *Yate* in the county aforeſaid, cro
the ſaid cloſe called the *Stub Riding*, un
For ſtopping a way. and into a certain common field called *Ho*
wood Common within the precinct of th
ſame manor, and within the precinct of th
ſaid leet, and the juriſdiction of the cou
of view of frankpledge aforeſaid, which b
fore then were within the juriſdiction
the court-leet aforeſaid he had ſtopped u
and ſtraitened, and the ſame way ſo ſtraiten
ed and ſtopped up then and for the ſpace
three months then laſt paſt had continue
ſtraitened and ſtopped up, to the commo
nuſance of the people of the ſaid lord th
king there by that way deſiring to paſ
whereupon the ſaid *N. Legg*, the occupi
of the ſaid cloſe called the *Stub Riding*, f
the cauſe aforeſaid, at and by the ſame cou
of view of frankpledge then and there w
Amercement affeered. amerced; which ſaid amercement by a
feerors then and there in the ſame cou
of view of frankpledge, to wit, *N. Whi*
and *T. Adey*, affeerors in the ſame cour
thereto then charged and ſworn, then an
there was duly affeered to 40*s.* and farth
in the ſame court by the ſaid then ſtewa
of the ſaid court, and the jurors aforeſai
it was ordered, that the ſaid *N. Legg*, bein
Order to open the way. the occupier of the cloſe aforeſaid, ſhou
open and leave open the way aforeſaid f
the ſubjects of the lord the now king the
after to travel and paſs before the 23d d

f *May* then next following, under the pe-
alty of 4 *l.* of lawful money of *England*, to
e forfeited to the lord in default thereof:
nd the ſame *T. Stephens*, *R. Parker* and *R.*
roke farther ſay, that the ſaid *N. Legg* af-
rwards, to wit, the ſame day, year and
lace laſt mentioned, had notice of the order Notice.
foreſaid, and that he being as aforeſaid the
ccupier of the cloſe aforeſaid called the
tub Riding, did not open the ſame way
r the liege ſubjects of the ſaid lord the
ing, there to travel and paſs at any time,
efore the ſaid 23d day of *May* then next
nſuing, according to the form of the
rder aforeſaid, by reaſon whereof at ano-
er court of view of frankpledge of the
id *T. Stephens*, *R. Parker* and *J. Neale*,
eld at *Old Sodbury* aforeſaid within the
anor aforeſaid, before the ſteward afore-
id, within one month next after the feaſt
f St. *Michael*, to wit, on the 23d day of
ctober in the 32d year of the reign of the
id lord the king aboveſaid, by the oath
f twelve other free and lawful men, being
en in the ſame court laſt mentioned,
wfully ſworn and charged to inquire and
reſent in form aforeſaid, it was in the
me court preſented, that the ſaid *N.* Preſentment,
egg, the occupier of the cloſe aforeſaid that it was
alled the *Stub Riding*, had not opened not opened.
e ſame way for the liege ſubjects of
e lord the now king there to travel and
aſs, according to the form of the ſaid
rder laſt mentioned in that behalf ſo as
foreſaid then before for that purpoſe made;
nd that by reaſon thereof the ſaid *N. Legg*,
e occupier of the ſaid cloſe called the *Stub*
Riding,

Riding, had forfeited to the ſame *T. Stephens*, *R. Parker* and *J. Neale*, the lords of the court aforeſaid, and of the manor aforeſaid, with the appurtenances, being then in form aforeſaid ſeiſed, the ſaid ſum and penalty of the ſaid 4 *l.* of lawful money of *England*: And the ſaid *T. Stephens*, *Robert Parker* and *Richard* farther ſay, that afterwards, and before the ſaid time when, *&c.* to wit, the 28th day of *October* in the 32d year of the reign of the ſaid lord the now king, the ſaid *John Neale* at *Old Sodbury* aforeſaid in the county aforeſaid, died, whereby not only the ſaid manor with the appurtenances came to the ſame *T. Stephens* and *R. Parker* by right of ſurvivorſhip, but the right of having the ſaid amercement and penalty accrued to them the ſaid *Thomas* and *Robert*: and the ſame *T. Stephens*, *Robert Parker* and *Richard* farther ſay, that at the time of the ſeveral preſentments and courts aforeſaid, ſo as aforeſaid held and made, the way aforeſaid was ſtopped and ſtraitened, and ſo continued, by the ſaid *N. Legg*, the occupier of the cloſe aforeſaid, to the common nuſance of the ſubjects of the ſaid lord the king; and becauſe the ſaid ſum and penalty of 4 *l.* above mentioned, at the ſaid time when, *&c.* was in arrear and unpaid, altho' it was demanded of the ſaid *N. Legg*, to wit, at *Old Sodbury* aforeſaid, the ſame *T. Stephens* and *R. Parker* in their own right well avow, and the ſaid *R. Broke*, as bailiff of the ſaid *T. Stephens* and *R. Parker*, and by their command, well acknowledges the taking of the cattle aforeſaid, then being the cattle of the ſaid *N. Legg*, at the

Death of one of the lords.

Avowry for non-payment.

the ſaid time when, &c. in the ſaid place where, &c. for the ſaid penalty of 4 *l.* being in form aforeſaid due and in arrear, and juſtly, &c.

And the ſaid *Nicholas* ſays, that neither the ſaid *Thomas* and *Robert* the taking of the cattle aforeſaid in the ſaid place where, &c. for the reaſon aforeſaid before alledged ought to avow juſt, nor the ſaid *Richard* for the ſame reaſon the ſame taking in the ſame place ought to acknowledge juſt, becauſe by proteſting that there is not any ſuch king's highway as is above ſuppoſed, for plea the ſame *Nicholas* ſays, that the way aforeſaid was not ſtraitened and ſtopped by the ſaid *Nicholas* in manner and form as the ſaid *Thomas* and *Robert* above by avowing, and the ſaid *Richard* above by acknowledging, have ſuppoſed: and this he is ready to verify: wherefore for that the ſaid *Thomas Stephens*, *Robert Parker* and *Richard Broke*, the taking of the cattle aforeſaid have above confeſſed, the ſame *Nicholas* prays judgment, and his damages by reaſon of the taking and unjuſt detention of thoſe cattle, to be adjudged to him, &c.

Bar, proteſting there was no ſuch way, ſays he did not ſtop it.

And the ſaid *Thomas Stephens*, *Robert Parker* and *Richard Broke* ſay, that the plea aforeſaid by the ſaid *Nicholas* above in bar to the avowry and cognizance aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to preclude them the ſaid *Thomas*, *Robert* and *Richard*, from having their avowry and cognizance aforeſaid, and that they to that plea in

Demurrer.

in manner and form aforeſaid pleaded have no neceſſity, nor are by the law of the land obliged in any manner to anſwer: and this they are ready to verify: wherefore, for want of a ſufficient plea in this behalf, the ſame *Thomas*, *Robert* and *Richard*, as before, pray judgment, and a return of the cattle aforeſaid, together with their damages, coſts and expences, by them about their ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, *&c.* And for cauſes of demurrer in law, the ſame *Thomas*, *Robert* and *Richard*, according to the form of the ſtatute in ſuch caſe lately made and provided, do ſet down, and to the Court here expreſs the cauſes following, to wit, becauſe the matter is traverſed otherwiſe than it is alledged in the declaration, whereby the plaintiff is obliged to prove what he hath not alledged, and likewiſe becauſe the matter traverſed is not traverſable by the laws of this kingdom of *England* in the manner in which it is traverſed in the plea.

The cauſes.

27 El. c. 5.
4 An. c. 16.

Joinder in demurrer.

And the ſaid *Nicholas* ſays, that the plea aforeſaid by him the ſaid *Nicholas* above in bar to the avowry and cogniſance aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law to preclude the ſaid *Thomas*, *Robert* and *Richard*, from having their avowry and cogniſance aforeſaid; which ſaid plea, and the matter in the ſame contained, the ſaid *Nicholas* is ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Thomas*

mas, *Robert* and *Richard*, do not anſwer to that plea, nor the ſame hitherto in any wiſe deny, the ſame *Nicholas* as before prays judgment, and his damages aforeſaid by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* But becauſe the court of the ſaid lord the king here are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid, before the lord the king from the day of St. *Michael* in three weeks, whereſoever, *&c.* to hear their judgment of and upon the premiſſes, becauſe the court of the ſaid lord the king here thereof not yet, *&c.*

Ingram and *Hale* at the Suit of *Fletcher*.

M. 7 *W.* 3. *Roll.* 107.

Stafford, to wit, *Joſeph Ingram* and *John Hale* were ſummoned to anſwer to *James Fletcher* in a plea, why they took a cow of him the ſaid *James*, and unjuſtly detained it, againſt ſurety and pledges, *&c.* And whereon the ſaid *James* by *John Lilly* his attorney complains, that the ſaid *Joſeph* and *John* on the 20th day of *February* in the 7th year of the reign of the lord *William* the Third, now king of *England*, *&c.* at *Shenſton* in the county aforeſaid, in a certain place there called the *Lane*, took the cow aforeſaid of him the ſaid *James*, and unjuſtly detained it, againſt * ſurety and pledges, until, *&c.* whereby the ſaid *James* ſays, that he is Declaration.

prejudiced, and hath damage to the value of 20*l.* And therefore he produces the ſuit, *&c.*

Cogniſance for a diſtreſs for a fine at a court-leet.

And the ſaid *Joſeph* and *John Hale* by *Thomas Callowe* their attorney come and defend the force and injury when, *&c.* and as bailiffs of *Rowland Fryth*, gent. well acknowledge the taking of the cow aforeſaid, in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe they ſay, that the ſame place in which the taking of the cow aforeſaid is ſuppoſed to be, contains, and at the ſaid time when the taking of the cow aforeſaid is ſuppoſed to be, contained in itſelf an acre of land with the appurtenances in *Shenſton* aforeſaid; which ſaid town of *Shenſton* is, and at the ſaid time when, *&c.* and alſo from time out of mind was, within the manor of *Shenſton* with the appurtenances in the county aforeſaid; of which ſaid manor with the appurtenances the ſaid *Rowland* is, and at the ſaid time when, *&c.* and long before was, ſeiſed in his demeſne as of fee; and the ſaid *Rowland*, and all thoſe whoſe eſtate he hath in the ſame manor with the appurtenances, for time out of mind have had, and been accuſtomed to have, a court-leet or view of frankpledge of the ſame manor, and whatever to view of frankpledge belongs, of all the inhabitants and reſiants of that manor, before the ſteward of the ſame court for the time being, every year within a month next after the feaſt of St. *Michael* the Archangel, at that manor yearly to be held, as to the ſame

Seiſin in fee.

Preſcription for a court-leet.

ſame manor with the appurtenances belonging: and the ſame *Joſeph* and *John* farther ſay, that within the manor aforeſaid there is, and from time out of mind hath been, ſuch cuſtom, that the jurors to inquire and preſent thoſe things, which to that court-leet and view of frankpledge belong, charged and ſworn, at the court of view of frankpledge of the manor aforeſaid, held at that manor within a month next after the feaſt of St. *Michael* the Archangel, yearly have choſen, and for all the time aforeſaid have been accuſtomed to chooſe, a proper man from the inhabitants within the manor aforeſaid to be conſtaſtable of the conſtablewick of *Shenſton* aforeſaid, to ſerve for one year in that office; which ſaid man ſo elected hath taken upon himſelf, and for all the time aboveſaid hath been uſed and accuſtomed to take upon himſelf that office, and hath taken and been accuſtomed to take an oath for the due execution of that office, under a reaſonable penalty, for all the time aboveſaid, by the jurors aforeſaid, at ſuch court-leet and view of frankpledge in that behalf ſet: and the ſame *Joſeph* and *John* farther ſay, that the ſaid *Rowland* being lord of the manor aforeſaid, and of the ſame in form aforeſaid ſeiſed, at a court-leet or view of frankpledge of that manor, held at that manor within a month next after the feaſt of St. *Michael* the Archangel, to wit, on the ninth day of *October* in the fifth year of the reign of the lord *William* now king and the lady *Mary* late queen of *England*, &c. before *Henry Fryth*, gent. then ſteward

Cuſtom to chooſe a conſtable.

Objected that it ſhould be for one year next enſuing.

A court-leet held.

to the ſaid *Rowland* of that court, the ſaid *James Fletcher* then and long before being an inhabitant within the manor aforeſaid at *Shenſton* aforeſaid, and a proper man to be conſtable of the ſaid conſtablewick of *Shenſton* aforeſaid, by *E. Thornton*, *T. Grace*, *J. C. J. A. J. H. W. M. W. R. N. W. T. S. J. M. J. S. J. A.* and *J. D.* good and lawful men, and inhabiting within the manor aforeſaid, and then and there in the ſame court charged and ſworn to inquire and preſent thoſe things which to that court-leet and view of frank-pledge belonged, duly and according to the cuſtom aforeſaid was choſen to be conſtable of the conſtablewick of *Shenſton* aforeſaid for one year then next enſuing to ſerve in that office; and thoſe jurors then and there in the ſame court ordered, that the ſaid *James* ſhould take his oath for the due execution of his office aforeſaid, under the penalty of forfeiting 40*s.* whereof the ſaid *James Fletcher* immediately afterwards, to wit, the ſame day and year there had notice (*a*): nevertheleſs the ſaid *James* hath not taken his oath for the due execution

The plaintiff elected conſtable.

The order of the jury.
The penalty for not ſerving.

(*a*) The chief juſtice held this to be naught; for, ſaid he, they ſhould only elect him, and he ſhould have notice of ſuch election, and if he did not thereupon go to a juſtice of peace to be ſworn, he ſhould be preſented for this default at the next court, and ſhould be amerced, and the amercement affeered. The court alſo held it naught for not laying the notice more particular, as that he was preſent in court, or that he had notice given that he was elected conſtable, and required to take an oath before a juſtice of peace. A ſecond preſentment *prout per* record, *&c.* The fine not paid. *Note*, it is ſaid in a caſe in *Moore*, that the bailiffs ſhould have had a warrant from the ſteward to diſtrain.

of

of the office of conſtable aforeſaid, nor hath executed or taken upon himſelf that office, but to do it then and often afterwards there abſolutely refuſed; wherefore afterwards and before the ſaid time when, &c. to wit, at a court-leet or view of frankpledge of the ſaid manor of the ſaid *Rowland*, held at that manor within a month next after the feaſt of St. *Michael* the Archangel, to wit, on the 11th day of *October* in the 6th year of the reign of the ſaid lord king *William* and the lady *Mary*, late queen of *England*, before *Henry Fryth* then ſteward to the ſaid *Rowland* of that court, by *Edward Thornton*, *J. C. W. P. T. G. T. G. J. P. J. J. E. H. T. S. J. M. W. M. G. H. J. S.* the younger, and *J. A.* good and lawful men then inhabiting within the manor aforeſaid, then and there in the ſame court ſworn and charged to inquire and preſent thoſe things which to that court-leet or view of frankpledge belonged, it was preſented, that the ſaid *James Fletcher*, becauſe he was duly elected to be conſtable of the conſtablewick of *Shenſton* aforeſaid at the laſt leet held for the manor aforeſaid, and under the penalty of 40*s.* on him ſet, was ordered to take upon himſelf that office, and execute it, and take his oath in form aforeſaid for the due execution of that office; which, or any part whereof, he had not done, wherefore he had forfeited to the lord of the manor aforeſaid the ſaid 40*s.* of the penalty aforeſaid, then to be paid to the lord of the manor aforeſaid, as by the record thereof in the cuſtody of the ſaid

ſteward of the court of the manor of him the ſaid *Rowland* at that manor remaining more fully appears: and becauſe the ſaid 40 *s.* for that penalty to the ſame *Rowland*, ſo as aforeſaid being lord of the manor aforeſaid, at the ſaid time when, *&c.* were in arrear and unpaid, the ſame *Joſeph* and *John Hale*, as bailiffs of him the ſaid *Rowland*, well acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* for the ſame 40*s.* for the penalty or amercement aforeſaid to the ſaid *Rowland* ſo being in arrear and unpaid, and within the manor aforeſaid, *&c.*

Demurrer.

And the ſaid *James* ſays, that by any thing by the ſaid *Joſeph* and *John* above in the cognizance aforeſaid by pleading alledged, the ſame *Joſeph* and *John* the taking of the cow aforeſaid in the ſaid place in which, *&c.* ought not to acknowledge juſt, becauſe he ſays, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* juſt, and that he to that cognizance in manner and form aforeſaid made and pleaded hath no neceſſity, nor is by the law of the land obliged, to anſwer: and this he is ready to verify: wherefore for want of a ſufficient plea in this behalf the ſame *James* prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cow aforeſaid, to be adjudged to him, *&c.*

And

And the ſaid *Joſeph* and *John* ſay, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law for them the ſaid *Joſeph* and *John* to acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* juſt; which ſaid plea, and the matter in the ſame contained, they the ſaid *Joſeph* and *John* are ready to verify and prove, as the court, *&c.* And becauſe the ſaid *James* hath not pleaded or anſwered to that cognizance, nor hitherto any way denied it, the ſame *Joſeph* and *John* pray judgment, and a return of the cow aforeſaid, together with their damages, coſts and charges, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, *&c.* But becauſe the court of the ſaid lord the king now here are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid before the lord the king until whereſoever, *&c.* to hear their judgment of and upon thoſe premiſſes, becauſe the court of the ſaid lord the king now here thereof not yet, *&c.* Joinder in demurrer.

Sylas Titus, Eſq; againſt *Parkins*, Knt.

Hertford, to wit. *William Parkins*, late of *Buſhey* in the county aforeſaid, Knt. was ſummoned to anſwer to *Sylas Titus*, Eſq; in a plea, why he took Declaration.

the cattle of him the ſaid *Sylas* and unjuſtly detained them, againſt ſurety and pledges, *&c.* And whereon the ſame *Sylas* by *John Warburton* his attorney complains, that the ſaid *William* on the 18th day of *May* in the firſt year of the reign of the lord *James* the Second, now king of *England*, *&c.* at *Buſhey*, in a certain place there called *Maryhill Ground*, the cattle of him the ſaid *Sylas*, to wit, 36 wether ſheep, 12 ewe ſheep and 8 lambs, took and unjuſtly detained them, againſt ſurety and pledges until, *&c.* whereby the ſame *Sylas* ſays that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the ſuit, *&c.*

3 Lev. 225.

Avowry and cogniſance for damage-feaſant.

And the ſaid *William* by *Randal Baldwin* his attorney comes and defends the force and injury when, *&c.* and the ſame *William* in his own proper right well avows, and as bailiff to *Algernon* earl of *Eſſex*, well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, in which the taking of the cattle aforeſaid is ſuppoſed to be, contains, and at the ſaid time, when the taking of the cattle aforeſaid is ſuppoſed to be, did contain in itſelf two acres of paſture with the appurtenances in *Buſhey* aforeſaid; which ſaid two acres of paſture with the appurtenances are, and at the ſaid time when, *&c.* were the ſoil and freehold of them the ſaid *William* and *Algernon* earl of *Eſſex*; and becauſe the cattle aforeſaid at the ſaid time when, *&c.* were in the ſaid two acres

acres of paſture eating up the graſs in the ſame then growing, and doing damage there, the ſame *William* in his own proper right well avows, and as bailiff to the ſaid *Algernon* earl of *Eſſex*, well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* ſo doing damage there, *&c.*

Bar, that the *locus in quo* is copyhold held of the manor of *Buſhey*, *&c.*

And the ſaid *Sylas* ſays, that the ſaid *William*, for the reaſon before alledged, the taking of the cattle aforeſaid in the ſaid place in which, *&c.* ought not in his own proper right to avow, and as bailiff of the ſaid earl to acknowledge juſt, becauſe he ſays, that the ſaid two acres of paſture in which, *&c.* are, and at the ſaid time when, *&c.* and alſo from time immemorial were, parcel of the manor of *Buſhey* and cuſtomary land of the ſame manor, and demiſed and demiſable by copy of court-roll of that manor by the lord or lords of the ſame manor, or by their ſteward of the court of that manor for the time being, to any perſon or perſons willing to take them in fee-ſimple, or otherwiſe, at the will of the lord or lords, according to the cuſtom of the manor aforeſaid: and the ſame *Sylas* farther ſays, that the ſaid earl and *William* before the ſaid time when, *&c.* to wit, on the 21ſt day of *April* in the firſt year of the reign of the ſaid lord the now king aboveſaid, were lawfully lords of the manor aforeſaid; and the ſaid earl and *William*, being then lords of the manor aforeſaid, the ſame earl and *William* afterwards and before the ſaid

That the defendant being lord of the manor, granted it to the plaintiff in fee, according, *&c.*

time when, &c. to wit, on the ſame 21ſt day of *April* in the firſt year aboveſaid, at a court of them the ſaid earl and *William*, of their manor aforeſaid, then held for that manor within the manor at *Buſhey* aforeſaid in the county of *Hertford*, by one *Thomas Smith*, gent. then their ſteward of the court of their manor aforeſaid, by copy of court-roll of that manor granted the ſaid two acres of paſture with the appurtenances in which, &c. among other things to the ſaid *Sylas*, to have and to hold to the ſame *Sylas*, his heirs and aſſigns for ever, at the will of the lords, according to the cuſtom of the manor aforeſaid; and the ſame *Sylas*, according to the cuſtom of the manor aforeſaid, then and there was admitted tenant thereof: by virtue of which ſaid grant and admiſſion, the ſame *Sylas* before the ſaid time when, &c. into the ſaid two acres of paſture with the appurtenances in which, &c. among other things, entred, and was, and yet is thereof ſeiſed in his demeſne as of fee, at the will of the lords, according to the cuſtom of the manor aforeſaid; and he the ſaid *Sylas* being ſo thereof ſeiſed, the ſame *Sylas* before the ſaid time when, &c. put his cattle aforeſaid into the ſaid two acres of paſture in which, &c. to feed on the graſs there then growing, and thoſe cattle were in the ſaid two acres of paſture in which, &c. feeding on the graſs there then growing, until the ſaid *William Parkins* on the ſaid 18th day of *May* in the firſt year aboveſaid, at *Buſhey* aforeſaid, in the ſaid two acres of paſture, called *Maryhill Grounds*, in which, &c. took the ſame cattle

And he being ſeiſed put in his cattle,

and the defendant diſtrained them.

cattle of the ſaid *Sylas*, and unjuſtly detained them, againſt ſurety and pledges until, *&c.* as the ſame *Sylas* above againſt him complains; and this he is ready to verify: wherefore for that the ſaid *William Parkins* the taking of the cattle aforeſaid hath above confeſſed, the ſame *Sylas* prays judgment, and his damages by reaſon of the taking and unjuſt detention of thoſe cattle, to be adjudged to him, *&c.*

Repl' that the land is held of the manor of B.

And the ſaid *W.* ſays, that well and true it is, that the ſaid two acres of paſture with the appurtenances in which, *&c.* are and at the ſaid time when, *&c.* and alſo from time immemorial were, parcel of the ſaid manor of *Buſhey*, and cuſtomary lands of the ſame manor, and demiſed and demiſable by copy of court-roll of that manor, by the lord or lords of the ſame manor, or by their ſteward of the court of that manor for the time being, to any perſon or perſons willing to take them in fee-ſimple, or otherwiſe, at the will of the lord or lords, according to the cuſtom of the manor aforeſaid; and that the ſaid earl and *W.* before the ſaid time when, *&c.* to wit, the ſaid 21ſt day of *April* in the firſt year of the reign of the ſaid lord the now king aboveſaid, were lawfully lords of the manor aforeſaid; and that the ſaid earl and *W.* then being lords of the manor aforeſaid, the ſame earl and *W.* afterwards and before the ſaid time when, *&c.* to wit, on the ſaid 21ſt day of *April* in the firſt year aboveſaid, at *Buſhey* aforeſaid, in the county of *Hertford* aforeſaid, by the ſaid *T. Smith*, then their ſteward of the court

Grant by copy.

court of their manor aforeſaid, by copy of court-roll of that manor granted the ſaid two acres of paſture with the appurtenances in which, *&c.* among other things, to the ſame *Sylas*; to have and to hold to the ſame *Sylas*, his heirs and aſſigns for ever, at the will of the lords, according to the cuſtom of the manor aforeſaid; and that the ſaid *Sylas*, according to the cuſtom of the manor aforeſaid, was then and there admitted tenant thereof; and that by virtue of the grant and admiſſion aforeſaid, he the ſaid *Sylas* before the ſaid time when, *&c.* into the ſaid two acres of paſture with the appurtenances among other things entered, and was thereof ſeiſed in his demeſne as of fee at the will of the lords, according to the cuſtom of the manor aforeſaid, as the ſaid *Sylas* above by pleading hath alledged: but the ſaid *W. Parkins* farther ſays, that the ſaid two acres of paſture with the appurtenances in which, *&c.* together with the other lands and tenements in the ſame copy mentioned, and by the ſame copy to the ſaid *Sylas* and his heirs granted, and to which the ſaid *Sylas* was as aforeſaid admitted, at the ſaid time of the admiſſion of the ſaid *Sylas* to the ſame, were and yet are of the clear yearly value of 28 *l.* and that the ſaid earl and *W.* by the ſaid *T. Smith* in the ſaid full court of the manor aforeſaid, held within that manor on the ſaid 21ſt day of *April* in the firſt year of the reign of the ſaid lord the now king aboveſaid, he the ſaid *T. Smith*, being then ſteward as aforeſaid of the ſaid earl and *W.* then lords of the manor

The yearly value.

manor aforeſaid, of the ſaid court of their manor aforeſaid, after the ſaid admiſſion of the ſaid *S. Titus* to the ſaid two acres in which, *&c.* and the ſaid other lands and tenements by the copy aforeſaid made to the ſaid *Sylas* granted, then and there did aſſeſs and appoint the ſum of 35 *l.* for the fine for the ſaid grant to the ſaid *Sylas* of the ſaid two acres of paſture with the appurtenances in which, *&c.* and the other lands and tenements aforeſaid, by the copy aforeſaid in form aforeſaid granted, to be paid by him the ſaid *Sylas* to the ſaid earl and *W.* being as aforeſaid lords of the manor aforeſaid, on the firſt day of *May* then next enſuing, at the porch of the pariſh church of *Buſhey* aforeſaid in the ſaid county of *Hertford*; and that the ſaid *Sylas* then and there, to wit, at the manor aforeſaid, of all and ſingular the premiſſes had notice: and the ſaid *W.* farther ſays, that the fine aforeſaid for the lands and tenements by the copy aforeſaid in manner and form aforeſaid granted to the ſaid *Sylas* was a reaſonable fine; and that the ſaid *S. Titus*, although he had notice from the ſaid lords of the manor aforeſaid, at the court aforeſaid held as aforeſaid at the manor aforeſaid, on the ſaid 21ſt day of *April* aforeſaid, of the premiſſes aforeſaid, did not pay to the ſaid earl and *W.* lords of the manor aforeſaid, or either of them, the ſaid ſum of 35 *l.* for the fine aforeſaid in form aforeſaid aſſeſſed, on the ſaid firſt day of *May* then next enſuing the admiſſion of him the ſaid *Sylas* at the ſaid porch of the pariſh church of *Buſhey* aforeſaid, but the

The fine.

Forfeiture for non-payment. Denial to pay an uncertain fine is no forfeiture. Raym. 42. Co. Ent. 647. There ought to be a demand. Cro. Eliz. 779. 4th edit. n. Cro. Jac. 617.

the ſame 35*l.* to the ſaid earl and *W.* then and there abſolutely denied and refuſed, and yet doth refuſe, to pay; whereby the ſame *S. T.* hath forfeited to the ſaid earl and *W.* being as aforeſaid the lords of the manor aforeſaid, whereof, *&c.* all his cuſtomary right, eſtate, title and intereſt aforeſaid, of and in the ſaid two acres of paſture with the appurtenances in which, *&c.* and the ſaid other lands and tenements in the grant aforeſaid ſpecified; after which ſaid forfeiture in form aforeſaid made, and before the ſaid time when, *&c.* the ſaid earl and *W.* being as aforeſaid lords of the manor aforeſaid, into the ſaid two acres of paſture with the appurtenances in which, *&c.* entered, and were, and yet are thereof ſeiſed in their demeſne as of fee; and becauſe the cattle aforeſaid after the entry aforeſaid, to wit, at the ſaid time when, *&c.* were in the ſaid two acres of paſture with the appurtenances in which, *&c.* eating up the graſs in the ſame then growing, and doing damage there, the ſame *W.* as before in his own proper right well avows, and as bailiff to the ſaid earl well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* ſo doing damage there: and this he is ready to verify: wherefore as before he prays judgment, and a return of the cattle aforeſaid, together with his damages, coſts and expences by him about his ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe thereof lately made and provided, to be adjudged to him, *&c.*

21 H. 8. c. 19.

And

And the ſaid *Sylas* by proteſting that the ſum aforeſaid of 35 *l.* for the fine aforeſaid for the ſaid lands and tenements by the copy aforeſaid to the ſaid *Sylas* in manner and form aforeſaid granted was not a reaſonable fine, as the ſaid *W.* above by pleading hath alledged, for plea the ſame *Sylas* ſays, that within the manor aforeſaid there is, and from time immemorial hath been, ſuch cuſtom uſed and approved within that manor for all the time aforeſaid, to wit, that every perſon or perſons who ſhall be admitted tenant or tenants to any cuſtomary lands or tenements of that manor by copy of court-roll of that manor, hath and have been and ought to pay to the lord or lords of the ſame manor for the time being, for a fine for his or their admiſſion to ſuch cuſtomary lands or tenements, ſo much money as thoſe lands or tenements were worth by the year at the time of ſuch admiſſion, and no more: and the ſaid *Sylas* in fact ſays, that the ſaid two acres of paſture with the appurtenances in which, *&c.* together with the other lands and tenements in the ſame copy mentioned, and by the ſame copy to the ſaid *Sylas* and his heirs granted, and to which the ſaid *Sylas* was as aforeſaid admitted, at the time of the admiſſion of the ſaid *Sylas* to the ſame were worth, and yet are worth, by the year 28 *l.* and no more: and the ſame *Sylas* farther ſays, that at the time of his admiſſion to the tenements aforeſaid with the appurtenances, to wit, at the ſaid court of the manor, held within that manor on the ſaid 21ſt day of *April* in the firſt year aboveſaid, he was ready

Proteſting the fine is unreaſonable, pleads a cuſtom to pay a year's value only.

The lands worth but 28 l. per ann. which he offered to pay.

ready and offered to pay to the ſaid *W.* then one of the lords of that manor, being then and there preſent in his proper perſon, ſo much money as the ſaid cuſtomary tenements with the appurtenances were worth by the year at the time of the admiſſion of him the ſaid *Sylas* to the ſame, to wit, 28 *l.* of lawful money of *England*; which ſaid 28 *l.* the ſaid *W.* then and there abſolutely refuſed to receive or accept of the ſame *Sylas:* and this he is ready to verify: wherefore as before he prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.*

Demurrer.

And the ſaid *W.* ſays, that the plea of the ſaid *Sylas* above in rejoining pleaded, and the matter in the ſame contained, are not ſufficient in law to preclude him the ſaid *W.* from having his avowry and cognizance aforeſaid, and that he to that plea in manner and form aforeſaid pleaded hath no neceſſity, nor is by the law of the land obliged, to anſwer: and this he is ready to verify: wherefore for want of a ſufficient plea in this behalf, the ſame *W.* as before prays judgment, and a return of the cattle aforeſaid, together with his damages, coſts and expences by him about his ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe thereof lately made and provided, to be adjudged to him, *&c.*

The cauſe.

27 El. c. 5.
4 A. c. 16.

And for cauſe of demurrer in law to that plea, the ſame *W.* according to the form of the ſtatute in ſuch caſe thereof lately made and provided, ſets down, and to the court here

here expreſſes this cauſe following, to wit, that the value of the land remains in eſtimation, and the cuſtom aforeſaid by the ſaid *Sylas* above in pleading pretended and alledged is incertain, inſufficient and void in law.

Joinder in demurrer.

And the ſaid *Sylas* for that he hath above alledged ſufficient matter in law in his plea aforeſaid above in rejoining pleaded to preclude t ſaid *W.* from having his avowry and cognizance aforeſaid, which he is ready to verify, which ſaid matter the ſaid *W.* doth not deny, nor thereto in any wiſe anſwer, but altogether refuſes to admit that averment, as before prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* And becauſe the juſtices here will adviſe themſelves of and upon the premiſſes before they give judgment thereon, day therefore is given to the parties aforeſaid here until on the octave of St. *Hilary* to hear their judgment thereon, becauſe the ſame juſtices here thereof not yet, *&c.* On which day here comes as well the ſaid *Sylas* as the ſaid *W.* by their attornies aforeſaid; and hereupon the premiſſes being ſeen, and by the juſtices here more fully underſtood, it ſeems to the ſaid juſtices here, that the ſaid plea of the ſaid *Sylas* above in rejoining pleaded, and the matter in the ſame contained, is ſufficient in law to preclude him the ſaid *W.* from having his avowry and cognizance aforeſaid, as the ſaid *Sylas* hath above alledged;

Judgment for the plaintiff.

wherefore the ſaid *Sylas* ought to recover his damages againſt the ſaid *W.* by reaſon of the taking and unjuſt detention of the cattle aforeſaid: but becauſe it is unknown what damages the ſaid *Sylas* hath ſuſtained by reaſon of the taking and unjuſt detention of the cattle aforeſaid, the ſheriff is commanded, that by the oath of good and lawful men of the county aforeſaid he diligently inquire what damages the ſaid *Sylas* hath ſuſtained, as well by reaſon of the taking and unjuſt detention of thoſe cattle, as for his coſts and charges by him about his ſuit in this behalf ſuſtained; and the inquiſition which he ſhall thereof make, he certify here from the day of *Eaſter* in 15 days, under the ſeal, *&c.* and the ſeals, *&c.* On which day here comes the ſaid *Sylas* by his attorney aforeſaid; and the ſheriff, to wit, *Joſeph Edmunds*, Eſq; hath now returned here a certain inquiſition taken before him at *Stevenage* in the county aforeſaid on the 15th day of *April* laſt paſt, by the oath of twelve, *&c.* whereby it is found that the ſaid *Sylas* hath ſuſtained damage by reaſon of the taking and unjuſt detention of the cattle aforeſaid, beſides his coſts and charges by him about his ſuit in this behalf expended, to 4*d.* and for thoſe coſts and charges to 6*d.* Therefore it is conſidered, that the ſaid *Sylas* do recover againſt the ſaid *William* his damages aforeſaid to 10*d.* by the inquiſition aforeſaid in form aforeſaid found, and alſo 9*l.* 5*s.* 2*d.* to the ſame *Sylas*, at his requeſt, for his coſts and charges aforeſaid, by the court here of increaſe

Inquiry awarded.

Signed 3 May, 2 jac. 2.

creaſe adjudged; which ſaid damages in the whole amount to 9 *l.* 6 *s.* And the ſaid *William* in mercy, *&c.*

This Judgment was affirmed on a Writ of Error.

AND the ſaid *C.* by *R. B.* his attorney, comes and defends the force and injury when, *&c.* and well avows the taking of the ſaid cattle in the ſaid place where, *&c.* to be juſt, becauſe he ſaith, that the ſaid place doth, and at the ſaid time when, *&c.* did contain in itſelf ten acres of land with the appurtenances; which ten acres of land with the appurtenances are, and at the time of taking the cattle aforeſaid were the ſoil and freehold of the ſaid *C.* and becauſe the cattle aforeſaid, at the ſaid time when, *&c.* were in the ſaid place where, *&c.* feeding upon the graſs there growing, and doing damage there, the ſaid *C.* well avows the taking of the cattle aforeſaid, in the ſaid place where, *&c.* and juſtly, *&c.* for the damage there ſo done as aforeſaid.

An avowry for damage-feaſant in the defendant's freehold.

And the ſaid (*plaintiff*) ſaith, That the ſaid *C.* ought not to avow the taking of the cattle aforeſaid in the ſaid place where, *&c.* to be juſt, becauſe he ſaith, That the ſaid ten acres with the appurtenances are, and at the ſaid time when, *&c.* were the ſoil and freehold of the ſaid (*plaintiff*) and not the ſoil and freehold of the ſaid *C.* as the ſaid *C.* hath above alledged; and this he

Pl. Gen. 574, 575.

prays may be inquired of by the country; and the ſaid *C.* does likewiſe the ſame.

Pippin and another at the Suit of *Maynard.*

Trin. 12 W. 3. in C. B.

Declaration in Replevin for the taking of the Plaintiff's Cattle.

The defendants plead property in a ſtranger, and for a return make cogniſance as bailiffs to *A.* and *B.* for damage-feaſant in their freehold.

AND the ſaid *Edward* and *Sarah* by *W. L.* their attorney come and defend the force and injury when, *&c.* and ſay, that at the time when the taking of the cattle aforeſaid is ſuppoſed to be, the property of thoſe cattle was in one *Stephen Hewes*, who is now ſurviving and in full life, to wit, at *H.* aforeſaid in the county aforeſaid; without that, that the property of the cattle aforeſaid at the time of the taking of them was in the ſaid *Jonathan Maynard*, as he by his writ and declaration aforeſaid above ſuppoſes: and this they are ready to verify: wherefore they pray judgment of the writ and declaration aforeſaid, and a return of the cattle aforeſaid, to be adjudged to them, *&c.* and to have a return of the cattle aforeſaid, the ſame *Edward* and *Sarah*, as bailiffs of *A. B.* and *C. B.* well acknowledge the taking of the cattle aforeſaid in the ſaid place where, *&c.* called *Hebrom*, and juſtly, *&c.* becauſe they ſay, that the ſame place called *Hebrom* contains, and at the ſame time when the taking of the cattle aforeſaid is ſuppoſed to be, did contain in itſelf 40 acres of paſture with the

the appurtenances in *Kingſthorpe* in the county aforeſaid; which ſaid 40 acres of paſture with the appurtenances are and at the ſaid time when, *&c.* were the ſoil and freehold of the ſaid *A. B.* and *C. B.* And becauſe the cattle aforeſaid at the ſaid time when, *&c.* were in the ſaid place called *Hebrom* aforeſaid, eating up the graſs there then growing, and doing damage there, the ſame *Edward* and *Sarah*, as bailiffs of the ſaid *A. B.* and *C. B.* well acknowledge the taking of the cattle aforeſaid in the ſaid place where, *&c.* and juſtly, *&c.* ſo doing damage there: wherefore they pray judgment, and a return of the cattle aforeſaid, to be adjudged to them, *&c.*

Repl' and iſſue on the property.

And the ſaid *Jo. Maynard* ſays, that his writ and declaration aforeſaid ought not to be quaſhed, becauſe, he ſays, that the property of the cattle aforeſaid at the ſaid time of the taking of them was in the ſaid *Jonathan Maynard* in manner and form as he by his writ and declaration aforeſaid hath above thereof alledged, to wit, at *Hebrom* aforeſaid in the county aforeſaid: and this he prays may be inquired of by the country: and the ſaid *Edward* and *Sarah* do ſo likewiſe: therefore the ſheriff is commanded that he cauſe to come, *&c.*

Where the defendant pleads property as to part, and *non cepit* as to the reſidue.

AND the ſaid *R.* by *R. B.* his attorney, comes and defends the force and injury when, *&c.* and as to the taking of ten ſacks of flour, part of the goods and chattels aforeſaid, he the ſaid *R.* ſaith, that the

property of thoſe goods and chattels at the ſaid time when, *&c.* were in the ſaid *R.* and not in the ſaid *T.* as it is above ſuppoſed by the writ aforeſaid; and this he is ready to verify; whereupon, as to the taking and detaining of thoſe goods and chattels, the ſaid *R.* prays judgment of the writ aforeſaid, and that it may be quaſhed, *&c.* And as to the taking of the reſidue of the goods and chattels aforeſaid, he the ſaid *R.* pleads, that he did not take thoſe goods and chattels, the ſaid reſidue, as the ſaid *T.* doth above complain againſt him; and thereof he puts himſelf upon the country; and the ſaid *T.* does likewiſe the ſame.

And the ſaid *T.* as to the ſaid plea of the ſaid *R.* above pleaded to quaſh the writ aforeſaid, ſaith, that his ſaid writ ought not to be quaſhed by reaſon of any thing above alledged, becauſe he ſaith, that the property of the goods and chattels aforeſaid above ſpecified in the ſaid plea, at the time of taking thoſe goods and chattels, was in the ſaid *T.* as he doth above ſuppoſe by his writ aforeſaid; and this he prays may be inquired of by the country; and the ſaid *R.* does likewiſe the ſame: therefore as well to try that iſſue, as the ſaid other iſſue above joined, the ſheriff is commanded, that he cauſe to come here twelve, *&c.*

Pl. Gen. 602.

Note; *Upon pleading* non cepit *on a Claim of Property, the Defendant ſhall have his Goods again.* Salk. 581.

AND the ſaid *W.* by *H. S.* his attorney comes and defends the force and injury when, *&c.* and as bailiff of *M. G.* well acknowledges the taking of the cattle aforeſaid in the ſaid place where, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, in which the taking of thoſe cattle is ſuppoſed to be, contains, and at the ſaid time when the taking of thoſe cattle is ſuppoſed to be, did contain in itſelf 40 acres of land with the appurtenances in *L.* aforeſaid, and that long before the ſaid time when, *&c.* the ſaid *F.* was ſeiſed of the ſaid 40 acres of land with the appurtenances, whereof the place where, *&c.* is parcel, in his demeſne as of fee, and the ſaid 40 acres of land held of the ſaid *M.* as of his manor of *B.* in the county of *S.* aforeſaid, by fealty, ſuit of court, and the rent of 12 *s.* 6 *d.* every year, at the feaſt of St. *Michael* yearly to be paid; of which ſervices the ſaid *M.* was ſeiſed by the hands by the ſaid *F.* as by the hands of his very tenant, to wit, of the fealty and ſuit of court, and of the rent aforeſaid in his demeſne as of fee; and becauſe 5 *l.* 12 *s.* 6 *d.* of the rent aforeſaid, for nine years ended at the feaſt of St. *Michael* in the 26th year of the reign of the ſaid lord the now king, to the ſame *M.* at the ſaid time when, *&c.* were in arrear and not paid, the ſame *W.* as bailiff of the ſaid *M.* well acknowledges the taking of the cattle aforeſaid in the ſaid place where, *&c.* and juſtly, *&c.* for the ſame five pounds twelve ſhillings and ſix-pence ſo in form aforeſaid being in arrear, as in parcel of the ſaid land of the ſaid *M.* in form aforeſaid held, and within the fee,

Cogniſance as bailiff for a rent charge.

&c. And this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, to be adjudged to him, *&c.*

Bar, that he was not ſeiſed, *&c.*

And the ſaid *F.* ſays, that the ſaid *M.* was not ſeiſed of the ſervices aforeſaid by the hands of him the ſaid *F.* as by the hands of his very tenant, as the ſaid *W.* hath above alledged: and this he is ready to verify: wherefore for that the ſaid *W.* the taking of the cattle aforeſaid in the ſaid place where, *&c.* hath above acknowledged, the ſame *F.* prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.*

Iſſue thereon.

And the ſaid *William* (as before) ſays, that the ſaid *M.* was ſeiſed of the ſervices aforeſaid by the hands of the ſaid *F.* as by the hands of very tenant, as he hath above alledged: and of this he puts himſelf upon the country: and the ſaid *F.* likewiſe, *&c.* Therefore the ſheriff is commanded, that he cauſe to come here from the day of the *Holy Trinity* in three weeks 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

Liddiard and *Creſwicke.*

M. 33 *C.* 2.

Avowry for damage-feaſant in his freehold.

AND the ſaid *Francis*, by *Andrew Innys* his attorney comes and defends the force and injury when, *&c.* and well avows the

the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. becauſe he ſays, that the ſame place in which, &c. is known, and at the ſaid time when, &c. and long before was known, as well by the name of *Hannam's Common*, as by the name of *Hannam's Heath*, and contains, and at the ſaid time when, &c. contained in itſelf 50 acres of paſture with the appurtenances in the ſaid pariſh of *Bitton* in the ſaid county of *Glouceſter*, which ſaid 50 acres of paſture with the appurtenances are, and at the ſaid time when, &c. were the ſoil and freehold of him the ſaid *Francis*; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place in which, &c. eating up the graſs there then growing, and doing damage there, the ſame *Francis* in his own proper right well avows the taking of the cattle aforeſaid, in the ſaid place in which, &c. and juſtly, &c. ſo doing damage there: and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, together with his damages, coſts and charges, in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe lately made and provided, to be adjudged to him, &c.

21 H. 8. c. 19.

And the ſaid *John Liddiard* ſays, that the ſaid *Francis*, for the reaſon before alledged, the taking of the cattle aforeſaid in the ſaid place in which, &c. ought not to avow juſt, becauſe by proteſting that the ſame place in which, &c. at the ſaid time when, &c. was not the freehold of him the ſaid *Francis*, as is above ſuppoſed, for plea the ſame *John* ſays,

Bar, That *T. M.* was ſeiſed in fee, and demiſed to *W. L.* and the plaintiff for their lives.

ſays, that long before the ſaid time of the taking of the cattle aforeſaid in the ſaid place in which, &c. to wit, on the 21ſt day of *Auguſt* in the 10th year of the reign of the lord *James*, late king of *England*, &c. *Theodore Newton*, knt. was ſeiſed in his demeſne as of fee of and in one meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances in *Hannam* and *Bitton* in the pariſh of *Bitton* aforeſaid in the county aforeſaid; and being ſo thereof ſeiſed, afterwards, to wit, on the ſaid 21ſt day of *Auguſt* in the 10th year of the reign of the lord *James*, late king of *England* aboveſaid, at *Bitton* aforeſaid in the county aforeſaid, demiſed the meſſuage aforeſaid and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, to *William Liddiard* and *Katherine* his wife, and him the ſaid *John Liddiard*; to hold to the ſaid *William Liddiard* and *Katherine* his wife for and during the term of their natural lives, and the natural life of the longer liver of them, and after their deceaſe the remainder thereof to the ſaid *John Liddiard* for and during the term of the natural life of him the ſaid *John:* by virtue of which ſaid demiſe the ſame *William* and *Katherine* afterwards of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow and paſture with the appurtenances, were ſeiſed in their demeſne as of freehold for the term of their lives and the life of the longer liver of them, the remainder thereof after their deceaſe to the ſaid *John* for the term of his life ſo as aforeſaid belonging; and the ſaid *William* and *Katherine*

rine being ſo thereof ſeiſed afterwards, to wit, on the firſt day of *September* in the 32d year of the reign of the lord *Charles* the Second, now king of *England*, *&c.* at *Bitton* aforeſaid in the county aforeſaid died thereof ſeiſed; after the death of which ſaid *William* and *Katherine* he the ſaid *John*, as in his remainder aforeſaid, afterwards to wit, on the ſaid firſt day of *September* in the 32d year of the reign of the lord *Charles* the Second, now king of *England*, *&c.* at *Bitton* aforeſaid in the county aforeſaid into the meſſuage aforeſaid and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, by virtue of the demiſe aforeſaid entered, and was and is yet thereof ſeiſed in his demeſne as of freehold for the term of his life: and the ſame *John* farther ſays, that at the time of the demiſe aforeſaid made, he the ſaid *Theodore Newton*, and all thoſe whoſe eſtate the ſame *Theodore* then had of and in the ſaid meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances, have had, and for time out of mind have been accuſtomed to have, for themſelves, their farmers and tenants, of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, common of paſture in the ſaid place in which, *&c.* for all their commonable cattle in and upon their tenements aforeſaid with the appurtenances levant and couchant every year at all times of the year, as to their tenements aforeſaid belonging and appertaining: by reaſon whereof the ſaid *John* before the ſaid time when, *&c.* to wit, on the 9th day of

The entry of the plaintiff.

Preſcription for common.

of *September* in the 33d year of the reign of the ſaid lord the now king, the cattle aforeſaid in the declaration aforeſaid above ſpecified, being then the proper cattle of him the ſaid *John*, upon the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, then levant and couchant, into the ſaid common called *Hannam's Common*, being the place in which, *&c.* put, as he well might, to uſe his common aforeſaid; and the ſaid *Francis* the ſaid cattle, to wit, the ſaid 30 ſheep ſo in the ſaid place in which, *&c.* put, feeding on the graſs there growing, and uſing the common of paſture of him the ſaid *John* there, afterwards at the ſaid time when, *&c.* to wit, on the 10th day of *September* in the 33d year aboveſaid, at *Bitton* aforeſaid in the ſaid place in which, *&c.* commonly called *Hannam's Common*, took and them unjuſtly detained, againſt ſurety and pledges, in manner and form as the ſaid *John* above againſt him complains: and this the ſame *John* is ready to verify: wherefore he prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.*

Repl. That it is his freehold.

And the ſaid *Francis Creſwicke* as before ſays, that the ſaid 50 acres of paſture, called *Hannam's Common*, otherwiſe *Hannam's Heath*, are, and at the ſaid time when, *&c.* were the ſoil and freehold of him the ſaid *Francis*; and becauſe the cattle aforeſaid at the ſaid time when, *&c.* were in the ſaid place in which, *&c.* eating

eating up the graſs then there growing, and doing damage there, the ſaid *Francis* the ſame cattle took, as he hath above alledged; without that, that the ſaid *Theodore*, and all thoſe whoſe eſtate the ſame *Theodore* then had of and in the ſaid meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances, have had, and from time out of mind have been accuſtomed to have, for themſelves, their farmers and tenants, of the ſaid meſſuage and the ſaid 47 acres and a half of land, arable, meadow and paſture, with the appurtenances, common of paſture in the ſaid place in which, *&c.* for all their commonable cattle in and upon their tenements aforeſaid with the appurtenances, levant and couchant every year at all times of the year, as to their tenements aforeſaid belonging and appertaining, as the ſaid *John* in bar to the avowry aforeſaid hath above alledged; and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, together with his damages, *&c.* to be adjudged to him, *&c.*

Traverſe of the preſcription.

And the ſaid *John Liddiard* as before ſays, that the ſaid *Theodore Newton*, and all thoſe whoſe eſtate the ſame *Theodore* then had in the ſaid meſſuage and 47 acres and a half of land, arable, meadow and paſture, with the appurtenances, have had, and from time out of mind have been accuſtomed to have, for themſelves, their farmers and tenants of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow

Iſſue on the traverſe.

meadow and paſture, with the appurtenances, common of paſture in the ſaid place in which, *&c.* for all their commonable cattle in and upon their tenements aforeſaid, with the appurtenances, levant and couchant every year, at all times of the year, as to their tenements aforeſaid belonging and appertaining, in manner and form as he the ſaid *John Liddiard* hath above alledged: and this he prays may be inquired of by the country: and the ſaid *Francis* does ſo likewiſe: therefore the ſheriff is commanded, that he cauſe to come before the lord the king in the octave of *St. Hilary* whereſoever, *&c.* 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid, *&c.*

A plea in bar to an avowry, that the plaintiff tendered to the defendant ſufficient amends for the damage feaſant.

AND the ſaid *A.* pleads, that the ſaid *C.* by reaſon of any thing above alledged, ought not to avow the taking of the cattle and chattels aforeſaid in the ſaid place wherein, *&c.* to be juſt, (or *ought not to juſtify*) becauſe he ſaith, that after the ſaid *C.* had taken the cattle and chattels in the place aforeſaid, to wit, [*on ſuch a day and year*] at *W.* aforeſaid, he the ſaid *A.* tendered to the ſaid *C.* 6*s.* 8*d.* which were ſufficient amends for the damages done to him in the ſaid place wherein, *&c.* which 6*s.* 8*d.* the ſaid *C.* then and there totally refuſed to accept, and unjuſtly detained the cattle and chattels aforeſaid, againſt ſureties and pledges, *&c.* until, *&c.* as he the ſaid *A.* doth above complain againſt him; and this

this he is ready to verify; wherefore, inaſmuch as the ſaid *C.* doth above acknowledge the taking of the ſaid cattle and chattels in the ſaid place wherein, *&c.* he the ſaid *A.* prays judgment and his damages, occaſioned by the taking and unjuſtly detaining of the cattle and chattels aforeſaid, to be adjudged to him, *&c.*

Defendant proteſting, that the 6 s. 8 d. tendered was not a ſufficient amends, for plea denies the tender.

And the ſaid *C.* proteſting, that the 6 *s.* 8 *d.* were not ſufficient amends for the damages aforeſaid done to the ſaid *C.* in the ſaid place where, *&c.* for plea ſaith, that the ſaid *A.* did not tender to the ſaid *C.* the ſaid 6 *s.* 8 *d.* for the damage done in the ſaid place where, *&c.* as the ſaid *A.* hath above alledged; and this he is ready to verify; wherefore he prays judgment, and a return of the cattle and chattels aforeſaid, to be adjudged to him, *&c.*

Plaintiff rejoins, that he did tender the 6 s. 8 d. and iſſue. Pl. Gen. 596, 597, 598.

And the ſaid *A.* as before ſaith, that he did tender to the ſaid *C.* the ſaid 6 *s.* 8 *d.* for the ſaid damages done him in the ſaid place where, *&c.* as he hath above alledged; and this he prays may be enquired of by the country.

An avowry, where the defendant traverſeth the place, and ſaith, that there are ſeveral places known by the ſame name, but that they are differently to be deſcribed, they having different additions.

AND the ſaid *H.* by *J. T.* his attorney comes and defends the force and injury when, *&c.* and pleads, that in the ſaid county of *D.* there is a place called *M. D.* and another place called *M.* in *E.* and another place called *M. J.* in *E.* aforeſaid; without that, that in the ſaid vill of *K.* there is, or at the ſaid time when, *&c.* was

was any place called or known by the name of *M.* only, and that he, at the ſaid time when the ſaid cattle is ſuppoſed to have been taken, took the ſaid ſix oxen and eight cows above ſpecified in the ſaid declaration, and alſo an horſe of the ſaid (*plaintiff*) in the ſaid place called *M. D.* without that, that he took the ſaid ſix oxen and eight cows at *K.* aforeſaid, in the ſaid place called *M.* only; as the ſaid (*plaintiff*) doth above ſuppoſe by his ſaid declaration, of all and ſingular which cattle aforeſaid, one Sir *P. E.* Knt. then ſheriff of the ſaid county of *D.* granted a replevin to the ſaid (*plaintiff*) upon his plaint thereon; and this he is ready to verify; wherefore he prays judgment of the declaration aforeſaid, and to have a return of all and ſingular the cattle aforeſaid; and the ſaid (*defendant*) as bailiff to *J. B.* well acknowledges the taking of the ſaid ſix oxen, eight cows, and one horſe, in the ſaid place called *M. D.* and juſtly, *&c.* becauſe he ſaith, [*ſo go on with the avowry, concluding with a prayer of a return*], *&c.*

This precedent *is agreeable to the caſe reported in* Salk. 93, 94. *where the defendant pleaded, that the cattle were taken in* another place; *without that*, &c. *and it was held by the Court that this was not enough, but the defendant muſt go further, and make an avowry for a* retorno habendo, *yet ſuch avowry is only a ſuggeſtion to bring him within the ſtatute of* H. 8. *for damages; before that ſtatute no damages were given, and without ſuch a ſuggeſtion, he is not within that ſtatute, and it being only*

7 & 21 H. 8 c. 19.

only for this particular purpoſe, is not traverſable.

AND the ſaid *Richard Poole* pleads, that the ſaid *Thomas Longuevill* ought not to avow the taking of the cattle aforeſaid in the ſaid place in which, *&c.* to be juſt, for the reaſon above alledged, nor ought they the ſaid *Anthony*, *William* and *Thomas Leadale*, as bailiffs to the ſaid *Thomas Longuevill*, to acknowledge the ſaid taking of the cattle aforeſaid in the ſaid place in which, *&c.* to be juſt, for the ſame reaſon, becauſe he ſaith, that he the ſaid *Richard Poole*, at the ſaid time when, *&c.* was, and long before had been poſſeſſed of and in a cloſe of paſture in *Burne* aforeſaid, near adjoining to the ſaid place called *Parks*, in which, *&c.* and further, the ſaid *Richard Poole* ſaith, that the ſaid *Thomas Longuevill*, and all thoſe whoſe eſtate he the ſaid *Thomas Longuevill* now hath, and at the ſaid time when, *&c.* had, of and in the cloſe aforeſaid called *Parks*, in which, *&c.* for ſo long a time as there is no remembrance of any man to the contrary, have made and repaired, and have been uſed and accuſtomed to make and repair, the hedges and fences between the ſaid cloſe called *Parks*, in which, *&c.* and the ſaid cloſe of paſture of the ſaid *Richard*; and the ſaid *Richard* further ſaith, that before and at the time when, *&c.* the hedges and fences between the ſaid cloſe in which, *&c.* and the ſaid cloſe of paſture of the ſaid *Richard Poole*

Plea.

That plaintiff at the time when, &c. and long before, was poſſeſſed of a cloſe adjoining to the place in which, &c. and that T. L. the principal defendant, and all thoſe, &c. time out of mind were uſed to repair the fences of the *locus in quo*, &c. which divided the ſame from the plaintiff's cloſe.

That thoſe fences before the time when, &c. were out of repair.

were broken, laid open, and in great decay for want of repairing them, by which means the cattle of the ſaid *Richard* being theretofore put into his ſaid cloſes of paſture, afterwards, and before the ſaid time when, *&c.* that is to ſay, upon the 27th day of *February* in the 18th year aforeſaid, eſcaped out of the cloſe of the ſaid *Richard*, and by the hedges and fences aforeſaid being broken, entered into the ſaid cloſe in which, *&c.* and there remained until they the ſaid *T. L. A. W.* and *T.* afterwards, and before that the ſaid *Richard* had or could have any notice of the ſaid cattle's being in the ſaid place in which, *&c.* (to wit) at the ſaid time when, *&c.* took the ſaid cattle in the ſaid place in which, *&c.* and unjuſtly detained them againſt ſureties and pledges, in the manner and form as the ſaid *Richard* doth above complain thereof againſt them; and this he is ready to verify; wherefore and inaſmuch as the ſaid *T. A. W.* and *J.* do above acknowledge the taking and detaining of the cattle aforeſaid, he the ſaid *R. P.* prays judgment, occaſioned by the taking and unjuſtly detaining of the cattle aforeſaid, to be adjudged to him, *&c.*

By reaſon whereof plaintiff's cattle eſcaped into the *locus in quo.*

And before the plaintiff had or could have any notice thereof, defendants took the cattle.

Plaintiff prays judgment, and his damages.

2 Saund. 289, 290.
2 Keb. 660. 680. 709.
2 Danv. 642. pl. 57.
2 Ventr. 50.
3 Lev. 260.
Lutw. 1165. 1577, 1578.
1 Saund. 226, 227.

To this plea in bar of the avowry the defendant demurred, and the plaintiff joined in demurrer, and judgment was given in the common pleas for the defendant, that the plaintiff's plea in bar was not good; upon which a writ of error was brought. The counſel for the plaintiff in error argued, that the judgment was erroneous, and that

the cattle could not be diſtrained, becauſe they eſcaped from the default of fences, which upon the face of the record ought to have been repaired by the defendant *Longueville.* Notwithſtanding this, the judgment was affirmed. The Court relied much upon the caſe in 10 *H.* 7. 21. *b.* where it is ſaid, that if the cattle eſcape into any land, and the lord diſtrains them, ſuch diſtreſs is good, and that it is not material whether they were levant and couchant or not. But *Saunders* in the report of this caſe takes notice, that this caſe, in his opinion, was hard to be maintained; for, ſays he, there is a vaſt difference between a lord's diſtraining within his ſeigniory and a leſſor's diſtraining for rent reſerved upon his own leaſe; for the lord hath nothing to do with the land or the fences, and ſo it is not material to him whether the fences are in repair or not: but it is otherwiſe of a leſſor; for he himſelf ought to repair the fences, or to take care that his tenant repairs them; otherwiſe he would take an advantage of his own wrong, which would be inconvenient. This diſtinction (ſays he) ſeems to be warranted by the books of *Mich.* 14 *&* 15 *Eliz. Dyer* 317, 318. 22 *Ed.* 4. 49. *b.* 7 *H.* 7. 1. 15 *H.* 7. 17. But if the cattle eſcape into the land without any default of the fences, or that the tenant of the land is not bound to repair thoſe fences, for default whereof the cattle eſcape and are diſtrained, it is not material to the lord or the leſſor, whether they are levant and couchant or not. *Note*; the caſe of *Reynolds* and *Oakley*, reported in 1 *Brownl.* 170. and

Co. Lit. 161.
2 Inſt. 19
1 Ro. Abr. 671.
Plowd. 38.
2 Edw. 4. 6.
2 Leon. 7.
3 Cro. 549. 596. 628.
Dyer 322. 372.
Fitz. Avow. 219.
11 H. 7. 48.
15 H. 7. 17.
Bro. Diſtreſs (43. 57.)
Treſpaſs 181.
43 Ed. 3. 32.
T. Raym. 39. 398.
1 Sid. 70.
2 Mod. 316, 317.
3 Mod. 112.
2 Lev. 22.
5 Mod. 147, 148.
Co. Litt. 47. b.

in *Hob.* 265. ſeems to favour this opinion of *Saunders*. There the defendant avowed for rent reſerved upon a leaſe for life, and the plaintiff in his plea in bar to the avowry ſhews, that the place in which, *&c.* did adjoin to the plaintiff's cloſe, and that the cattle, againſt the plaintiff's will, did eſcape into the other cloſe, and that he did preſently follow the cattle, and before he could drive them out of the cloſe, the defendant diſtrained them. The Court held, that inaſmuch as the beaſts were always in the plaintiff's poſſeſſion, and in his view, the defendant could not diſtrain thoſe cattle as the cattle of a ſtranger; but if he had permitted the beaſts to have remained there by any ſpace of time, tho' they had not been levant and couchant, the leſſor might have diſtrained them as the beaſts of a ſtranger. In the report of this caſe in *Hob.* the opinion of the Court does not appear, for it is there ſaid, the caſe had been ſomewhat better, if the tenant ought to maintain the fences.

Eldridge and *Burfield.*

Nonſuit in replevin for not declaring.

Suſſex, to wit. THomas *Eldridge* was ſummoned to anſwer to *Robert Burfield* in a plea, why he took ſeven cows of him the ſaid *Robert* and them unjuſtly detained, againſt ſurety and pledges, *&c.* And whereon the ſame *Thomas* in his proper perſon hath offered himſelf the fourth day againſt the ſaid *Robert* in the plea aforeſaid; and the ſame *Robert*, although ſolemnly called,

called, doth not come, but hath made default: therefore it is conſidered, that the ſaid *Thomas Eldridge* do go thereof without day, *&c.* and that the ſaid *Robert* and his pledges to proſecute, to wit, *John Doe* and *Richard Roe*, be in mercy, *&c.* *Q.* The names of the pledges, *&c.* and that the ſaid *Thomas* have a return of the cows aforeſaid, *&c.* Afterwards, to wit, on day next after in this ſame term before the lady the queen at *Weſtminſter*, comes here into court the ſaid *Robert Burfield* by *A. B.* his attorney, and by the ſtatute, *&c.* prays the writ of the lady the queen of ſecond deliverance of the cattle aforeſaid; and to him it is granted, returnable here from the day of wheresoever, *&c.* 13 E. 1. c. 2.

Inquiry of damages in replevin where judgment was given for the defendant on demurrer.

ANNE, &c. To the ſheriff of *Middleſex*, greeting: Whereas *John S.* late of the pariſh of St. *Clement Danes* in your county, Eſq; was ſummoned to be in our court before us to anſwer to *William P.* Eſq; in a plea, why on the 14th day of *October* in the firſt year of our reign, at the pariſh of St. *Clement Danes* in your county, in a certain place there called a chamber, in *Devereux Court*, he took the goods and chattels of him the ſaid *William*, to wit, one bed, one bedſtead, one bolſter, one pillow, four curtains valance, two blankets, one quilt, one cheſt of drawers, 20 books, one looking glaſs, one large bruſh, one large trunk, and four chairs, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* And the ſaid *John S.* came and in our ſame court before us alledged and ſaid, that the ſaid *William* ought not to have or maintain

his action aforeſaid thereof againſt him, becauſe he ſaid, that as to the ſaid one bed, one bedſtead, one bolſter, one pillow, four curtains valance, two blankets, one quilt, one looking glaſs, and ten books, parcel of the goods and chattels aforeſaid, in the declaration aforeſaid mentioned, the property of thoſe goods and chattels at the ſaid time of the taking of the ſame was in him the ſaid *John*; without that, that the property of thoſe goods and chattels at the ſaid time of the taking of the ſame was in the ſaid *William*, as by the declaration aforeſaid was above ſuppoſed; and this he was ready to verify: and as to the ſaid one cheſt of drawers, one large bruſh, one large trunk, ten other books, and four chairs, the reſidue of thoſe goods and chattels laſt mentioned, the property of the ſame goods and chattels was in one *Richard F.* without that, that the property of the reſidue of thoſe goods and chattels was in the ſaid *William*, as by the declaration aforeſaid was above ſuppoſed: and this he was ready to verify and prove, *&c.* wherefore he prayed judgment if the ſaid *William* ought to have or maintain his action aforeſaid thereof againſt him, *&c.* and he prayed alſo a return of all and ſingular the goods and chattels aforeſaid, together with his damages, coſts and charges by him about his ſuit in that behalf expended, to be adjudged to him, *&c.* And the ſaid *William* ſaid, that the plea aforeſaid by the ſaid *John* above pleaded, and the matter in the ſame contained, were inſufficient in law to preclude him the ſaid *William* from having his action aforeſaid againſt the ſaid *John*, and that he to that plea in manner

Demurrer.

and

and form aforeſaid pleaded had no neceſſity, nor was by the law of the land obliged in any manner to anſwer: and this he was ready to verify: wherefore, for want of a ſufficient anſwer in this behalf, he the ſame *William* prayed judgment and his damages, by reaſon of the caption and unjuſt detention of the goods and chattels aforeſaid, to be adjudged to him, *&c.* And the ſaid *John* ſaid, that the plea aforeſaid by him the ſaid *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid againſt him the ſaid *John*; which ſaid plea, and the matter in the ſame contained, he the ſame *John* was ready to verify and prove, as the court, *&c.* And becauſe the ſaid *William* did not anſwer to that plea, nor hitherto in any wiſe deny it, he the ſame *John* (as before) prayed judgment, and a return of all and ſingular the goods and chattels aforeſaid, together with his damages, *&c.* to be adjudged to him, *&c.* And it was thereupon in ſuch manner proceeded in our ſame court before us, that it was conſidered, that the plea aforeſaid by him the ſaid *John* above pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid againſt him the ſaid *John:* it was alſo conſidered, that the ſaid *William P.* ſhould take nothing by his writ aforeſaid, but for his falſe claim ſhould be in mercy, *&c.* and that the ſaid *John* ought to recover his damages againſt the ſaid *William* by reaſon of the caption and

Joinder.

Judgment for the defendant.

unjuſt detention of the goods and chattels aforeſaid: therefore we command you, that by the oath of 12 good and lawful men of your bailiwick you diligently inquire what damages the ſame *John* hath ſuſtained, as well by reaſon of the caption and unjuſt detention of the goods and chattels aforeſaid, as for his coſts and charges by him about his ſuit in this behalf expended; and the inquiſition which you ſhall thereof take ſend to us on whereſoever we ſhall then be in *England*, under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with our writ to you therefore directed. Witneſs *J. Holt*, Knt. at *Weſtminſter* 12th day of *February* in the ſecond year of our reign.

An inquiry of the arrear of rent and value of the cattle diſtrained on a nonſuit in a replevin.

GEORGE, &c. To the ſheriff of *Suſſex*, greeting: Whereas *William A.* was ſummoned to be in the court of the lady *Anne*, late queen of *Great Britain, &c.* before the late queen herſelf, to anſwer to *Matthew G.* in a plea, why the ſaid *William* on the 9th day of *April* in the 12th year of the reign of the ſaid lady the queen at *Chalvington* in the county aforeſaid, in a certain place there called the *Croft*, took the cattle, to wit, eight ewes and ſix lambs, of him the ſaid *Matthew*, and them unjuſtly detained, againſt ſurety and pledges, *&c.* And the ſame *William* in the ſame court before the ſaid lady the late queen appearing, for a certain cauſe by him alledged ſaid, that he took the cattle aforeſaid at *Ripe*, otherwiſe *Cocklington* in the county aforeſaid; without that,

that, that he took the cattle aforeſaid at *Chalvington* in the county aforeſaid, as the ſaid *Matthew* by his declaration aforeſaid had above alledged: and this he was ready to verify: wherefore he prayed judgment of the writ aforeſaid, and that the ſaid writ and declaration, *&c.* and to have a return of the cattle aforeſaid; the ſame *William*, as bailiff of *Robert R.* well acknowledged the taking of the cattle aforeſaid in the ſaid place to be juſt, *&c.* becauſe he ſaid, that the ſame place, called the *Cony Earths*, contained in itſelf five acres of land with the appurtenances in the ſaid pariſh of *Ripe*, otherwiſe *Cocklington* in the county aforeſaid, of which ſaid five acres of land with the appurtenances the ſame *Robert R.* before the ſaid time when, *&c.* was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, before the ſaid time when, *&c.* to wit, on the 18th day of *March* in the 11th year of the reign of the ſaid lady the late queen, at the pariſh of *Semiſton* in the county aforeſaid, the ſaid *Robert R.* demiſed to one *Matthew G.* the younger, the ſaid five acres of land with the appurtenances, by the name of all thoſe two pieces or parcels of paſture, called the *Cony Earths*, with the appurtenances, lying and being in *Ripe*, otherwiſe *Cocklington* aforeſaid; to have and to hold the ſaid five acres of land with the appurtenances whereof, *&c.* to the ſame *Matthew G.* from the feaſt of the Annunciation of the Bleſſed Virgin *Mary* then next enſuing unto the end and term of one whole year, and ſo from year to year as long as both parties ſhould pleaſe; yielding and paying therefore the yearly

3 Leon. 213.

yearly rent or ſum of 50*s.* of lawful money of *Great Britain*, at the two moſt uſual feaſts or terms in the year, to wit, on the feaſt of St. *Michael* the Archangel and the Annunciation of the Bleſſed Virgin *Mary*, by even and equal portions to be paid: by virtue of which demiſe the ſame *Matthew G.* the younger, afterwards, and before the ſaid time when, *&c.* to wit, on the 26th day of *March* in the year laſt aboveſaid, into the ſaid five acres of land with the appurtenances whereof, *&c.* entered, and was thereof poſſeſſed; and he the ſaid *Matthew G.* the younger being ſo thereof poſſeſſed, and the ſaid *Robert* of the reverſion of the ſaid five acres of land with the appurtenances being ſeiſed in his demeſne as of fee; and becauſe 50*s.* of the rent aforeſaid, for one year ended on the feaſt of the Annunciation of the Bleſſed Virgin *Mary* in the 12th year of the reign of the ſaid late queen, to the ſame *Robert* after that feaſt and at the ſaid time when, *&c.* were in arrear and unpaid, the ſame *William*, as bailiff of the ſaid *Robert*, well acknowledged the taking of the cattle aforeſaid in the ſaid place in which, *&c.* as in parcel of the tenements aforeſaid with the appurtenances whereof, *&c.* to the ſame *Matthew G.* in form aforeſaid demiſed, and juſtly, *&c.* for the ſaid 50*s.* rent to the ſaid *Robert* in form aforeſaid being in arrear, *&c.* And this he was ready to verify: wherefore he prayed judgment, and a return of the cattle aforeſaid, together with his damages, coſts and charges in this behalf expended, according to the form of the ſtatute in ſuch

caſe

caſe made and provided, to be adjudged to him, &c. And afterwards the ſaid lady the queen departed this life: and upon this the ſaid *Matthew* prayed leave of our court before us until on the morrow of the Holy *Trinity*, whereſoever, &c. to plead in bar to the cogniſance aforeſaid; and he had, &c. The ſame day was given to the ſaid *William*, &c. On which day came the ſaid *William* into our ſame court before us at *Weſtminſter*; and the ſaid *Matthew*, although ſolemnly called, did not come, nor farther proſecute his writ aforeſaid: therefore it is conſidered, that the ſaid *Matthew* take nothing by his writ aforeſaid, but be in mercy for his falſe claim thereof, and that the ſaid *William* do go thereof without day, &c. Therefore we command you, that, according to the form of the ſtatute in ſuch caſe lately made and provided, by the oath of 12 good and lawful men of your county you diligently inquire how much of the yearly rent aforeſaid at the ſaid time of the taking and diſtraining of the goods and chattels aforeſaid was in arrear and unpaid, and how much the goods and chattels aforeſaid ſo as aforeſaid taken and diſtrained were worth, according to the true value of the ſame; and the inquiſition which, &c. ſend to us from the day of St. *Michael* in three weeks under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with this writ. Witneſs *T. Parker*, knt.

Demiſe of the queen.

Nonſuit.

Inquiry.

17 C. 2. c. 7.

The execution of this writ appears in a certain ſchedule to this inquiſition annexed.

The return.

Suſſex, to wit. AN inquiſition indented taken at *Eaſtgrinſtead*, in the county aforeſaid on the 5th day of *Auguſt*, *&c.* In witneſs whereof as well I the ſheriff as the jurors aforeſaid have to this inquiſition ſet our ſeals the day, year and place aboveſaid.

James Smith, bart. ſheriff.

The rent in arrear 8 *l.*
The value of the goods 8 *l.*
For coſts, according to the form of the ſtatute 9 *l.*
8 *December* 1715.

An inquiry of damages in replevin after judgment on demurrer.

JAMES, *&c.* To the ſheriff of *Glouceſter*, greeting: Whereas *John W.* gent. lately in our court before us at *Weſtminſter*, by our writ impleaded *Francis C.* eſq; *Henry C.* the elder, *George T. William B.* and *Henry C.* the younger, in a plea, why they took the cattle of him the ſaid *John*, and them unjuſtly detained, againſt ſurety and pledges, *&c.* And thereupon the ſame *John* by *Thomas E.* his attorney complained, that the ſaid *Francis*, *Henry C.* the elder, *George*, *William*, and *Henry C.* the younger, on the firſt day of *September* in the 36th year of the reign of the lord *Charles* the Second, late king of *England*, *&c.* at the pariſh of St. *Philip* and *James* in your county aforeſaid, in a certain place there called *Conham*, took the cattle, to wit fifty ſheep, of him the ſaid *John*, and them unjuſtly detained,

tained, againſt ſurety and pledges, until &c. whereby he then ſaid that he was prejudiced, and had damage to the value of 20 *l.* And therefore he then produced the ſuit, &c. And thereupon the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, by *C. H.* their attorney came and defended the force and injury when, &c. And the ſaid *Francis* in his own right well avowed, and as bailiff of *Thomas S.* and *Stephen C.* gent. well acknowledged, and the ſaid *Henry*, *George*, *William* and *Henry*, as bailiffs of the ſaid *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforeſaid, in the ſaid place in which, &c. and juſtly, &c. becauſe they ſaid that long before the ſaid time when, &c. the lord *Charles* the Second, late king of *England*, &c. was ſeiſed of and in the foreſt or chaſe called *Kingſwood*, with the appurtenances in your county aforeſaid, in his demeſne as of fee in the right of his crown of *England*; and that the ſaid place in which, &c. is and at the ſame time when, &c. and alſo for time immemorial was within the foreſt aforeſaid, and parcel of the ſame foreſt, and that the ſame late king being ſo ſeiſed before the ſaid time, when, &c. by indenture made at *Weſtminſter* in the county of *Middleſex*, on the 20th day of *January* in the 21ſt year of the reign of the ſame late king, between the ſame late king of the one part, and one *Baynham T.* knt. and bart. of the other part, which ſaid indenture, ſealed under the great ſeal of *England*, the ſame *Francis*, *Henry*, *George*, *William* and *Henry* then in court produced, the date whereof is the day and year laſt above-ſaid,

Avowry and cogniſance.

ſaid, the ſame late king *Charles* the Second, for the conſiderations in the ſame indenture mentioned, with the advice of two of the commiſſioners of the treaſury of the ſame late king, granted, demiſed and to farm let to the ſaid *Baynham* the foreſt or chaſe aforeſaid, with the appurtenances, by the name of all that foreſt or chaſe called *Kingſwood*, lying and being in or near the pariſh of St. *Philip* and *James* in the city of *Briſtol* in the pariſh of *Bitten Mangetfield*, otherwiſe *Mangerfield Stapleton*, otherwiſe *Stableton*, *Hambrooke* and *Weſtanham* in your county, containing by eſtimation 3432 acres of waſte land, more or leſs, and extending on ſundry other lands, as well waſte as incloſed, in or near the pariſhes aforeſaid, or ſome of them, together with all bucks, does and other beaſts then being within the limits of the foreſt or chaſe aforeſaid, and all liberties, franchiſes, privileges, rights and appurtenances to the ſame foreſt or chaſe belonging, incident or appendant, or within the foreſt or chaſe then before had, uſed or enjoyed in the times of the lady *Elizabeth*, late queen of *England*, or of the lord *James*, late king of *England*, and the lord *Charles* the Firſt, late king of *England*, or any of them, by reaſon or pretence of the ſaid foreſt or chaſe, or the liberties and franchiſes of the ſame, to have and to hold the ſaid foreſt, chaſe, franchiſes, liberties, privileges, and all and ſingular other the premiſſes in the ſame indenture mentioned and intended to be thereby granted, with their and every of their appurtenances to the ſaid *B. T.* his executors, adminiſtrators and aſſigns, from the feaſt of

of St. *Michael* the Archangel then laſt paſt, for and during the term of 60 years from thence next enſuing, fully to be compleat and ended: and the ſaid late king *Charles* the Second willed, and by the ſame indenture for himſelf, his heirs and ſucceſſors, gave and granted to the ſaid *Baynham*, his executors, adminiſtrators and aſſigns, full power and authority to repleniſh the foreſt or chaſe aforeſaid with deer, and by all lawful ways and means to erect lodges for the keepers, and to hinder and ſuppreſs purpreſtures, aſſarts and nuſances there, of what nature or kind ſoever, and alſo to preſerve the covert and vert for the ſafety and preſervation of the beaſts aforeſaid, as by the indenture aforeſaid, among other things, is more fully manifeſt; by virtue of which ſaid demiſe the ſaid *Baynham* into the foreſt or chaſe aforeſaid, with the appurtenances, entered, and was thereof poſſeſſed, and being ſo thereof poſſeſſed, the ſame *Baynham* afterwards, and before the ſaid time when, *&c.* to wit, on the firſt day of *March* in the 32d year of the reign of the ſaid lord king *Charles* the Second, at the pariſh of St. *Philip* and *James* aforeſaid, aſſigned to one *Mary B.* the premiſſes aforeſaid, with the appurtenances, and all his right, title and intereſt of and in the ſame, to have and to hold to the ſame *Mary*, her executors and aſſigns, during all the reſidue of the ſaid term of 60 years then to come and unexpired, by virtue of which ſaid aſſignment the ſame *Mary* into the premiſſes aforeſaid entered and was thereof poſſeſſed; and being ſo thereof poſſeſſed, the ſaid *Mary* afterwards,

wards, and before the ſaid time when, &c. to wit, on the third day of *January* in the 33d year of the reign of the ſaid lord king *Charles* the Second, at the pariſh of St. *Philip* and *James* aforeſaid, aſſigned to the ſaid *Francis*, *Thomas* and *Stephen*, the premiſſes aforeſaid, with the appurtenances, and all her right, title and intereſt of and in the ſame, to have and to hold to the ſame *Francis*, *Thomas* and *Stephen*, during all the reſidue of the ſaid term of 60 years then to come and unexpired, by virtue of which ſaid aſſignment the ſame *Francis*, *Thomas* and *Stephen*, into the premiſſes aforeſaid, with the appurtenances, entered, and were and yet are thereof poſſeſſed; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place in which, &c. eating up the graſs there growing, and doing damage there, the ſaid *Francis* in his own right well avowed, and as bailiff of the ſaid *Thomas* and *Stephen* acknowledged, and the ſaid *Henry*, *George*, *William* and *Henry*, as bailiffs of the ſaid *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. ſo doing damage there: and this they were ready to verify: wherefore they prayed judgment, and a return of the cattle aforeſaid, together with their damages, coſts and charges in that behalf expended, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, &c. And the ſaid *John W.* thereto ſaid, that the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, for the reaſon before alledged, ought not as bailiffs of the

ſaid *Thomas S.* and *Stephen C.* to acknowledge, nor the ſaid *Francis* in his own right to avow the taking of the cattle aforeſaid in the ſaid place in which, &c. juſt; becauſe by proteſting that the ſaid lord king *Charles* the Second never was ſeiſed of the ſoil or land of the foreſt or chaſe of *Kingſwood* aforeſaid, for plea the ſame *John W.* ſaid, that long before the ſaid time of the taking of the cattle aforeſaid made, and alſo before the ſaid time when it is ſuppoſed that the ſaid late king *Charles* the Second was ſeiſed of the foreſt or chaſe aforeſaid, to wit, on the third day of *April* in the 23d year of the reign of the late king *Charles* the Firſt, *John W.* the elder, father of him the ſaid *John W.* was ſeiſed of the manor of St. *Lawrence* within the pariſh of St. *Philip* and *James*, with the appurtenances, in your county aforeſaid, whereof the ſaid place in which, &c. is and at the ſame time when, &c. and alſo for time immemorial was parcel, in his demeſne as of fee; and being ſo thereof ſeiſed, the ſame *John W.* the elder afterwards and before the ſaid time when, &c. at *Conham* aforeſaid died of ſuch his eſtate thereof ſeiſed, after whoſe death the ſaid manor with the appurtenances, whereof the ſaid place in which, &c. is parcel, deſcended to the ſaid *John* as ſon and heir of him the ſaid *John*, by reaſon whereof the ſaid *John* the ſon afterwards and before the ſaid time when, &c. into the ſaid manor with the appurtenances entered, and at the time of the taking of the cattle aforeſaid was and yet is ſeiſed thereof in his demeſne as of fee, and being ſo thereof ſeiſed, the ſame *John* before the Plea.

ſaid time when, &c. put his cattle aforeſaid into the ſaid place in which, &c. to feed on the graſs there then growing, until the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* on the day and year in the declaration aforeſaid ſpecified, at *Conham* aforeſaid, took the cattle aforeſaid of him the ſaid *John*, and unjuſtly detained them againſt ſurety and pledges, until, &c. as he above againſt them complained: and this he was ready to verify: wherefore he prayed judgment and his damages, by reaſon of the caption and unjuſt detention of thoſe cattle, to be adjudged to him, &c. And the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* thereupon ſaid, that the ſaid plea of the ſaid *John* above in bar of the avowry and cogniſance aforeſaid pleaded, was inſufficient in law to maintain him the ſaid *John* to have his action aforeſaid againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, and that they to that plea in manner and form aforeſaid pleaded had no neceſſity, nor were by the law of the land obliged in any manner to anſwer: and this they were ready to verify: wherefore for want of a ſufficient plea in this behalf they prayed judgment, and a return of the cattle aforeſaid, together with their damages in this behalf ſuſtained, to be adjudged to them, &c. And for cauſe of demurrer in law in this behalf, the ſame *Francis*, *Henry*, *George*, *William* and *Henry* did ſet down, and to the court here expreſs the cauſes following, to wit, that the ſaid *John* in his plea aforeſaid did not traverſe the matter in the avowry and cogniſance aforeſaid, when he ought to traverſe that matter, as they ſaid;

Demurrer.

The cauſes. 27 El. c. 5. 4 Ann. c. 16.

ſaid; and becauſe the matter of that plea was not iſſuable nor triable, and becauſe that plea was inſufficient and wanted form, and thereupon the ſaid *John W.* ſaid that the plea aforeſaid by him the ſaid *John* above in bar to the avowry and cogniſance aforeſaid pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* from having their avowry and cogniſance aforeſaid; which ſaid plea, and the matter in the ſame contained, the ſame *John* was ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* to that plea did not anſwer, nor hitherto in any wiſe deny it, the ſame *John* as before prayed judgment and his damages aforeſaid, by reaſon of the caption and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* And becauſe the court of the ſaid lord the king here were not adviſed to give their judgment of and upon the premiſſes, day therefore was given to the parties aforeſaid before the ſaid lord the king from the day of *Eaſter* in 15 days, whereſoever, *&c.* to hear their judgment of and upon the premiſſes, becauſe the court of the ſaid lord the king thereof, *&c.* On which day before the lord the king at *Weſtminſter* came the parties aforeſaid, by their attornies aforeſaid; whereupon all and ſingular the premiſſes being ſeen, and by the court of the ſaid lord the king fully underſtood, and mature deliberation being thereon had, it was conſidered that the plea aforeſaid by him the ſaid *John* above in bar to the avowry and cogniſance aforeſaid pleaded, was

Joinder in demurrer.

Judgment for the plaintiff.

good and ſufficient in law to maintain him the ſaid *John* to have his action aforeſaid againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*: wherefore it was alſo conſidered, that the ſaid *John* ought to recover his damages againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, by reaſon of the caption and unjuſt detention of the cattle aforeſaid; but becauſe it is not known what damages the ſaid *John* hath ſuſtained by the reaſon aforeſaid; therefore we command you, that by the oath of 12 good and lawful men of your bailiwick, you diligently inquire what damages the ſaid *John* hath ſuſtained, as well by reaſon of the premiſſes as for his coſts and damages by him about his ſuit in this behalf expended; and the inquiſition which you ſhall thereupon take, ſend to us whereſoever, *&c.* under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with this writ. Witneſs *Edmund Herbert*, Knt. at *Weſtminſter*, the 17th day of *May* in the ſecond year of our reign.

Enquiry.

The Manner of entering an Inquiſition in Replevin, according to the Statute of 17 Car. 2. *upon a Judgment for the Avowant upon a Demurrer, where a Writ of Inquiry was awarded to inquire of the Value of the Diſtreſs, and a Judgment thereon.*

After awarding the Inquiry, and the words, *The ſame day is given to the (plaintiff) to be there*, &c. you ſay thus:

AT which day the ſaid *T. R.* (*i. e.* the plaintiff) comes before our ſovereign lord the king at *Weſtminſter*, by his attorney aforeſaid, and the ſheriff (to wit) *J. A.* Eſq; returns an inquiſition taken before him at the caſtle of *York* in the county aforeſaid, on the 30th day of *March* in the eighth year of the reign of his preſent majeſty, whereby it is found that the ſaid ſix hogſheads of allum, at the time of the taking thereof * *were worth* 100 *l.* according to the true value thereof; therefore it is adjudged, that the ſaid *T. R.* do recover againſt the ſaid *J. M.* the ſaid 100 *l.* for the value of the ſaid ſix hogſheads of allum † *part of the ſaid rent* being in arrear as aforeſaid, found by the ſaid inquiſition in the manner aforeſaid, and his damages ſuſtained by reaſon of the premiſſes here adjudged by the ſaid court of our ſaid ſovereign lord the king, according to the form of the ſtatute in ſuch caſe made and provided, to the ſaid *T. R.* to 80 *l.* with his conſent, for his expences and coſts laid out by him about his ſuit in this cauſe,

* Note; when the goods are inanimate, they ſay, were worth ſo much; if animate, were of ſuch a price.

† Theſe words are where the diſtreſs doth not amount to the value of the rent.

which ſaid value, expences and coſts, do in the whole amount to 180 *l.* and be the ſaid *J. M.* amerced, *&c.*

1 Saund. 195.

An Inquiſition and Judgment upon the ſame Statute, upon a Judgment on a Demurrer for the Avowant, and a Writ to inquire of the Monies in Arrear, and of the Value of the Diſtreſs, and Judgment thereon.

After the judgment upon the demurrer that the plea in bar to the avowry is inſufficient, concluding, *that the plaintiff take nothing by his writ, but be amerced for his falſe complaint, and that the defendant is diſmiſſed the court,* you go on thus;

AND thereupon they the ſaid *T. A. W.* and *T.* according to the form of the ſtatute in ſuch caſe made and provided, pray his majeſty's writ to be directed to the ſheriff of the county aforeſaid, to inquire what monies were in arrear for the rent aforeſaid, at the time of the diſtreſs made as aforeſaid, and the value [or price] of the cattle taken; therefore the ſheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick he diligently inquire what ſums of money were in arrear for the rent aforeſaid at the time of the diſtreſs made, and what was the value of the cattle diſtrained according to the true value thereof; and the inquiſition which, *&c.* the ſheriff ſhould return, or make

make appear here in three weeks from the day of St. *Michael*, under the ſeal, *&c.* and the ſeals, *&c.* at which day *T. A. W.* and *T.* came here by their ſaid attorney, and the ſheriff, (to wit) Sir *R. M.* Knight and Baronet, now returns an inquiſition taken before him at the caſtle of *York* in the county aforeſaid, on the 6th day of *Auguſt* laſt paſt, by the oath of twelve good and lawful men, whereby it is found that the ſaid ſums of money in arrear for the rent aforeſaid, to the ſaid *T. L.* at the time of the diſtreſs were 39*l.* and that the cattle diſtrained, according to the true value [or price] thereof, were worth 38*l.* Therefore it is adjudged, that the ſaid *T. A. W.* and *T.* do recover againſt the ſaid *R. P.* the ſaid 38*l.* for the value of the cattle aforeſaid, being part of the rent in arrear as aforeſaid, found by the ſaid inquiſition in the manner aforeſaid, and his damages by reaſon of the premiſes, by this court adjudged to the ſaid *T. A. W.* and *T.* at their requeſt, by the diſcretion of the juſtices here, for his expences and coſts laid out by them in this ſuit, according to the form of the ſtatute in ſuch caſe made and provided, to 10*l.* which value, expences and coſts, do in the whole amount to 48*l.* *&c.*

1 Saund. 286, 287.

Retorno Habendo.

GEORGE the Second, *&c.* To the ſheriff of *Middleſex*, greeting: Whereas *J. S.* late of the pariſh of St. *Clement's Danes*

A *retorn' habend'* after judgment for the defendant, upon a demurrer in replevin.

Danes in your county, Eſq; was ſummoned to be in our court before us, to anſwer to *W. P.* Eſq; of a plea, (or *in an action*) wherefore on the 14th day of *October* in the firſt year of our reign, at the pariſh of St. *Clement's Danes* in your county, in a certain place there, called a *chamber* in *Devereux Court*, he took the goods and chattels of the ſaid *W.* (to wit) one bed, one bedſtead, *&c.* [*ſo naming the goods*] and unjuſtly detained them, againſt ſureties and pledges, until, *&c.* and the ſaid *J. S.* came into our ſame court before us, and alledged and pleaded, that the ſaid *William* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſaid, that as to the one bed, one bedſtead, [*repeating part of the goods*] part of the goods and chattels aforeſaid in the ſaid declaration mentioned, that the property of thoſe goods and chattels at the aforeſaid time of taking them were the property of the ſaid *J.* and this he was ready to verify: and as to one couch, ten other books, [*ſo naming the goods to which he pleads this plea*] reſidue of the ſaid goods and chattels in the declaration of the ſaid *W.* mentioned, the ſaid *John* pleaded, that at the time of taking thoſe goods and chattels the property of them was in and belonging to one *R. F.* without that, that the property of the ſaid reſidue of the goods and chattels in the declaration mentioned, at the time when, *&c.* was the property of the ſaid *William*, as by the ſaid declaration above was ſuppoſed: and this he was ready to verify and prove; wherefore he prayed

prayed judgment, if the aforeſaid *William* ought to have or maintain his ſaid action againſt him for the ſame, *&c.* and he alſo prayed a return to be adjudged to him of all the goods and chattels aforeſaid, together with his damages, expences and coſts laid out by him about his ſuit in that behalf; and the ſaid *William* replied, that the plea of the ſaid *John* above pleaded, and the matter therein contained, were not ſufficient in law to preclude the ſaid *William* from having his ſaid action againſt the ſaid *John* for the ſame, and that he was not under a neceſſity, nor was bound by the law of the land to anſwer in any manner to that plea, in the manner and form as the ſame was pleaded; which he was ready to verify: wherefore, for want of a ſufficient anſwer in that behalf, he the ſaid *William* prayed judgment, and his damages occaſioned by the taking and unjuſtly detaining the goods and chattels, to be adjudged to him, *&c.* and the ſaid *John* rejoined, that the plea aforeſaid by him pleaded, in the manner and form aforeſaid, and the matters therein contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid thereof againſt the ſaid *John*; which plea, and the matters therein contained, he the ſaid *John* was ready to verify and prove, as the Court ſhould require; and becauſe the ſaid *William* had not anſwered to that plea, nor in any wiſe denied the ſame, he the ſaid *John*, as above, prayed judgment, and a return of all and ſingular the goods and chattels aforeſaid, together with his damages, *&c.* to be adjudged to him,

him, &c. and ſuch proceedings were thereupon had in our ſame court before us, that it was adjudged, that the ſaid plea by him the ſaid *John* above pleaded, and the matters therein contained, were good and ſufficient in law to preclude the aforeſaid *William* from having his ſaid action againſt the ſaid *John*; and it was alſo conſidered by our ſame court before us, that the ſaid *W.* ſhould take nothing by his ſaid writ, but for his falſe claim therein ſhould be in mercy, (or *amerced*) &c. and that the aforeſaid *J. S.* ſhould go thereof without a day, (or *ſhould for ever be diſmiſſed the court,*) &c. and that he ſhould have a return of the goods and chattels aforeſaid, to be delivered to him for ever irreplegiable: and further, it was conſidered in our ſaid court before us, that the aforeſaid *John* ought to recover his damages againſt the ſaid *W.* by reaſon of the premiſes: therefore we command you, that without delay you cauſe the ſaid *John* to have a return of the goods and chattels irreplegiable, and that you ſhall not deliver thoſe things of which you have made mention, which belong to the complaint of the ſaid *William*, without our writ, which ſhall expreſsly mention the ſaid judgment; and in what manner you ſhall execute this writ, do you make appear to us, whereſoever we ſhall then be in *Great Britain*, on We command you likewiſe, that by the oath of 12 honeſt and lawful men of your bailiwick, according to the form of the ſtatute in that caſe made and provided, you diligently inquire what damages the ſaid *John* hath ſuſtained,

ſuſtained, as well by reaſon of the premiſes, as for his expences and coſts laid out by him about his ſuit in that behalf; and the inquiſition which you ſhall take thereon do you return to us at the day aforeſaid, whereſoever we ſhall then be in *Great Britain*, under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall take ſuch inquiſition, together with this our writ to you directed for that purpoſe. Witneſs *Robert* Lord *Raymond*, *&c.*

The return of a *return' habend'* and a writ of inquiry by the bailiff of the liberty, and a *non omittas* and a *capias* awarded.

AT which day comes here the ſaid defendant by his attorney aforeſaid, and the ſheriff, (that is to ſay) *W. H.* Eſq; now returneth here, that in order to have an execution of the writ aforeſaid to him directed, he made a mandate to Sir *John Hobart*, Knight and Baronet, bailiff of the liberty of our ſoverign lord the king, of his duchy of *Lancaſter* in the county aforeſaid, who hath full power of returning all writs, and of executing the ſame within the liberty aforeſaid, to whom the execution of the writ aforeſaid doth entirely belong to be made; for that no execution of the writ aforeſaid, within the liberty aforeſaid, in his bailiwick, could be made by him, which bailiff made a return to the ſaid ſheriff, upon the mandate aforeſaid, that before the coming of the mandate aforeſaid to his hands, the cattle, goods and chattels aforeſaid were eloigned by the ſaid plaintiff to places to the ſaid bailiff unknown, ſo that he could not cauſe the cattle, goods and chattels aforeſaid of the ſaid (*defendant*)

to

to be returned, as by the warrant aforeſaid he was commanded; the ſaid bailiff alſo returned, to the ſaid ſheriff an inquiſition taken before him at *F.* within the liberty aforeſaid in the county aforeſaid, on the firſt day of *October* laſt paſt, by the oath of twelve, *&c.* by virtue of the warrant aforeſaid directed by the ſheriff upon the writ aforeſaid to the ſaid bailiff, by which it was found, that the ſaid defendant ſuſtained damage by reaſon of the premiſes, beſides his coſts to and for thoſe coſts and charges to Therefore it is adjudged, that the ſaid defendant do recover againſt the ſaid plaintiff his damages aforeſaid to by the inquiſition found in the manner aforeſaid; and alſo pounds to the ſaid defendant, at his requeſt, for his coſts and charges aforeſaid, adjudged by the Court by way of increaſe, which damages do in the whole amount to *&c.* And hereupon the ſheriff is commanded, that he do not omit, by reaſon of any liberty of the duchy of *Lancaſter* aforeſaid: but that of other cattle, goods and chattels of the (*plaintiff*) to the value of the cattle, goods and chattels aforeſaid before taken, he take *in withernam*, and deliver them to the ſaid defendant, to be detained by him until the cattle, goods and chattels aforeſaid before taken be delivered by the (ſaid plaintiff) and in what manner, *&c.* the ſheriff ſhall make appear, *&c.*

GEORGE the Second, &c. greeting: Whereas *A. B.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *C. D.* in an action, wherefore he took nine cows, the cattle of him the ſaid *C.* and unjuſtly detained them, againſt ſureties and pledges, &c. and the ſaid *A.* appearing in our ſame court before us, for a certain reaſon by him alledged in our ſame court, in his own right, and the right of *S.* his wife, well avowed the taking of the ſaid cattle in the place in which, &c. to be juſt, for 9*l.* rent due and in arrear from him the ſaid *C.* to the ſaid *A.* and *S.* for one half year, ending at the feaſt of the Annunciation of the bleſſed Virgin *Mary* next before, &c. [*as in the avowry*] for one meſſuage, &c. with the appurtenances in *W.* demiſed by them the ſaid *A.* and *S.* to the ſaid *C.* whereupon the ſaid *C.* though ſolemnly called, did not appear, nor doth further proſecute his ſaid writ; wherefore it was conſidered in our ſame court before us, that he and his pledges for proſecuting ſhould be amerced, and that the ſaid *A.* might depart the court thereon without a day, and ſhould have a return of the ſaid cattle: therefore we command you, that without delay you return the ſaid cattle to the ſaid *C.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſsly mention the ſaid judgment; and in what manner you execute this writ, you make appear to us in three weeks from the day of St. *Michael*, whereſoever,

A *retorn' habend'* againſt the plaintiff, for default of his plea in bar to an avowry. Theſ. Brev. 220.

whereſoever, &c. and have you there this writ. Witneſs, &c.

A *retorn habend'* upon a judgment againſt the plaintiff, by default. Lilly's Entr. 637.

GEORGE the Second, &c. greeting: Whereas *T. E.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *R. B.* in an action wherefore he took ſeven cows, the cattle of him the ſaid *R. B.* and unjuſtly detained them, againſt ſureties and pledges, &c. as he alledged; and the ſaid *R.* afterwards made default in our ſaid court before us; wherefore it was conſidered in our ſame court before us, that he and his pledges for proſecuting ſhould be amerced, and that the ſaid *T.* might depart the court without a day, and ſhould have a return of the cattle aforeſaid: therefore we command you, that without delay you return the ſaid cattle to the ſaid *T.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſsly mention the ſaid judgment; and in what manner you execute this writ you ſhall make appear to us in three weeks from the day of St. *Michael*, whereſoever, &c. And have you there this writ. Witneſs, &c.

Second Deliverance.

K. B.

A writ of ſecond deliverance. Theſ. Brev. 503.

GEORGE the Second, to the ſheriff of *Eſſex*, greeting: If *T. W.* ſhall give you ſecurity that he will proſecute his claim, and

and alſo to return the cattle, (*which in our court before us were lately adjudged to *T. J.* through the default of the ſaid *T. W.*) if a return thereof ſhall be adjudged; then do you cauſe thoſe cattle without delay, (or *forthwith*) to be delivered to the ſaid *T. W.* and by ſureties and ſafe pledges compel the ſaid *T. J.* that he be before *us in three weeks from the day of St. *Michael*, whereſoever we ſhall then be in *England*, to anſwer to the ſaid *T. W.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs *Philip* Lord *Hardwicke*, the 28th day of *November* in the ninth year of our reign.

K. B.

GEORGE the Second, *&c.* To the ſheriff of *Eſſex*, greeting: If *C. D.* ſhall give you ſecurity that he will proſecute his claim, and alſo return the cattle which in our court before us were lately adjudged to *A. B.* through the default of the ſaid *C.* we command you, that if by means of our writ *de retorn' habendo* lately directed to you for that purpoſe, you have made a return of the ſaid cattle to the ſaid *C. D.* then do you cauſe them to be delivered to the ſaid *C. D.* and by ſureties and ſafe pledges compel the ſaid *A.* that he be before us on the octave of St. *Hilary*, whereſoever we ſhall then be in *England*, to anſwer to the ſaid *C.* for taking and unjuſtly detaining the cattle aforeſaid; and have you

Another form. Theſ. Brev. 303.

you there the names of the pledges, and this writ. Witneſs, &c.

K B.

The entry of an award of this writ.

T. F. by *A. B.* his attorney, offers (or *tenders*) himſelf on the 4th day againſt *W. T.* of a plea, (or *in an action*) wherefore he took the cattle of the ſaid *W. T.* and unjuſtly detained them, againſt ſureties and pledges; and he came not, and the plaintiff was there, &c. therefore he and his pledges, to wit, *John Doe* and *Richard Roe*, are amerced, &c. and the ſaid *T. F.* may depart the court therefrom without a day, &c. and may have a return of the cattle aforeſaid, &c. and afterwards, (to wit) on the octave of St. *Martin* then next following, before our ſovereign lord the king at *Weſtminſter*, comes the ſaid *W.* by *J. B.* his attorney, and, by virtue of the ſtatute in ſuch caſe made and provided, prays his majeſty's writ of *ſecond deliverance*, &c. and it is granted him, &c. returnable on the octave of St. *Martin*, whereſoever, &c. The ſame day is given to the ſaid *T. F.* &c.

Miſericordia.

Sine die.

The difference between this writ in the common pleas from the former, is no otherwiſe than at the firſt aſteriſk in the firſt writ before, you ſay, which in our court before our juſtices at *Weſtminſter* were adjudged to *T. J.* through the default of the ſaid *T. W.* *And at the ſecond aſteriſk you ſay*, that

Theſ. Brev. 303.

that he be before our juſtices at *Weſtminſter*, in three weeks from the day of St. *Michael*, to anſwer, *&c.*

C. B.

A writ of ſecond deliverance after bail taken. Offic. Brev. 348.

GEORGE the Second, *&c.* To the ſheriff of *Eſſex* greeting: Becauſe *Lewis B.* in our court before our juſtices at *Weſtminſter*, hath given you ſecurity that he will proſecute his claim, and will alſo make a return of thoſe cattle which in our ſame court were adjudged to *Stephen R.* through the default of the ſaid *L.* if a return thereof be adjudged to him: therefore we command you, that without delay you cauſe a mare which you have taken *in withernam*, of the cattle of the ſaid *L.* to the value of the cattle formerly taken, to be delivered to the ſaid *L.* and compel the ſaid *S.* by ſureties and ſafe pledges, that he be before our juſtices at *Weſtminſter* on the octave of St. *Hilary*, to anſwer to the ſaid *L.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs Sir *Thomas Reeve*, Knt. the 28th day of *November* in the ninth year of our reign.

The return of a writ of ſecond deliverance.

BY virtue of this writ to me directed, I have cauſed to be delivered to the within named *L.* his cattle within mentioned, as I am within commanded to do: the

pledges within named are *John Denn* and *Richard Fenn.*

J. D. Eſq; ſheriff.

Capias in Withernam.

GEORGE the Second, *&c.* To the ſheriff of *Suffolk* greeting: Whereas we lately commanded you by our writ, that whereas *T. B.* gentleman, had been attached by our writ of *ſecond deliverance*, to appear in our court before us, to anſwer to *J. S.* in an action, wherefore he took the cattle of the ſaid *J.* and unjuſtly detained them, againſt ſureties and pledges, and the ſaid *J. S.* in our ſame court made default; wherefore it was conſidered in our ſame court, that the ſaid *T. B.* ſhould depart hence without a day, and that the ſaid *J. S.* and his pledges for proſecuting ſhould be amerced; and that the ſaid *T. B.* ſhould have a return of the cattle aforeſaid irreplegiable; and that you without delay ſhould make a return of thoſe cattle to the ſaid *T. B.* to be detained by him irreplegiable; and in what manner you ſhould execute that writ, you ſhould make known to us [*ſuch a return*] whereſoever we ſhould then be in *England*; and you at that day returned to us, that the cattle aforeſaid were eloigned by the ſaid *T. S.* to places unknown to you, ſo that you could not return or deliver thoſe cattle to the ſaid *T. B.* as you was commanded by the ſaid writ; therefore we command you, that

that you take ſo many cattle of the ſaid *J. S.* to the value of the cattle aforeſaid, before taken by the ſaid *J. S. in withernam*, and deliver them to the ſaid *T. B.* to be kept by him irreplegiable, until you can make a return of thoſe cattle before taken, to the ſaid *T. B.* and in what manner you ſhall execute this our mandate, do you make appear to us on the octaves of St. *Hilary*, whereſoever we ſhall then be in *England*; and that you cauſe further to be done therein, what of right, and according to the laws and cuſtoms of this our kingdom of *Great Britain*, we ſhall ſee meet to be done; we alſo command you, that if the ſaid *T. B.* ſhall make you ſecure of proſecuting his claim, and of returning the chattels aforeſaid, if a return thereof ſhould be adjudged, then do you compel the ſaid *J. S.* by ſureties and ſafe pledges, that he before us [*ſuch a return*] whereſoever we ſhall then be in *England*, to anſwer as well to us for the contempt, as to the ſaid *T. B.* for his damage and injury done him in this caſe; and have you there this writ. Witneſs, *&c.*

A *capias in withernam*, upon a writ of *pluries replegiari facias.*

GEORGE the Second, *&c.* To the ſheriff of *E.* greeting: Whereas we have often commanded you, that you ſhould juſtly and without delay, grant a replevin to *R. E.* of his chattels (to wit) of thoſe which *T. T.* and *J. C.* had taken and unjuſtly detained (as it is ſaid) according to our writ before delivered to you, or that you ſhould be before us [*ſuch a return*] where-

ſoever we ſhould then be in *England*, to ſhew us a reaſon, why you neglected to execute our mandates ſo often directed to you: and you at that day made a return to us, that the chattels aforeſaid were eloigned by the ſaid *T. T.* and *J. C.* out of your bailiwick to places to you unknown, ſo that you could in no wiſe grant a replevin thereof to the ſaid *R.* Therefore we command you, *&c.* [*as in the former*].

A *capias in withernam*, upon a *retornum habendo*, after an avowry and a *ca. ſa.* againſt the party for the damages.

GEORGE the Second, *&c.* To the ſheriff of the city of *G.* greeting: Whereas *J. P.* was lately ſummoned in our court before us, to anſwer to *J. W.* of a plea [or *in an action*] wherefore he on the 28th day of *April* [*in ſuch a year*] at the city of *G.* (to wit) in a place there called *P.* had taken the cattle of the ſaid *J.* to wit, twenty ſheep, and impounded and unjuſtly detained them, againſt ſureties and pledges, until, *&c.* (as he declared); and the ſaid *J. P.* appearing in our ſaid court, for a certain reaſon therein alledged by him, well avowed the taking of the ſaid cattle in the ſaid place where, *&c.* to be juſt, *&c.* for damage feaſant therein; and the ſaid *J. W.* afterwards in our ſame court made default: wherefore it was conſidered there, that they and their pledges for proſecuting ſhould be amerced, *&c.* and that the ſaid *J.* ſhould be diſmiſſed therefrom without a day; and that he ſhould have a return of the cattle aforeſaid: therefore we lately commanded you, that you ſhould without delay make a return of

The declaration.

The avowry.

Default.

Miſericordia.

Sine die.

Return of the cattle.

of the cattle aforeſaid to the ſaid *J. P.* and that you ſhould not deliver them at the deſire of *J. W.* without our writ, which ſhould expreſsly mention the judgment aforeſaid; and in what manner you ſhould execute that precept, you ſhould make appear to us [*on the return*] whereſoever we ſhould then be in *England*; we alſo lately commanded you, that according to the ſtatute in ſuch caſe made and provided, you ſhould diligently inquire by the oaths of honeſt and lawful men of your bailiwick, what damages the ſaid *J. P.* hath ſuſtained, as well by reaſon of the premiſſes, as for his expences and coſts laid out by him about his ſuit in that behalf; and that you ſhould return to us at the time aforeſaid, the inquiſition which you ſhould take thereon, under your ſeal and the ſeals of thoſe perſons by whom you ſhould take the inquiſition, together with this writ; and you at that day returned to us, that the ſaid cattle had been eloigned by the ſaid *J. W.* to places unknown to you; for which reaſon you could not return thoſe cattle to the ſaid *J. P.* and you alſo returned a certain inquiſition taken before you in the city of *G.* in the county of the ſaid city, on the 19th day of *April* [*in ſuch a year*] whereby it was found, that the ſaid *J.* had ſuſtained damages by reaſon of the premiſſes, beſides his expences and coſts laid out by him about his ſuit in that behalf, to 10*s.* and for his expences and coſts to 2*d.* Therefore it was adjudged, that the ſaid *J. P.* ſhould recover againſt the ſaid *J. W.*

Second deliverance.

Elongata returned by an

Inquiſition.

The finding of the jury.

Judgment.

his damages aforeſaid found by the inquiſition aforeſaid; and alſo 10*l.* awarded by our court before us, to the ſaid *J. P.* for his expences and coſts by way of increaſe; which ſaid damages in the whole amounted to 10*l.* 10*s.* 2*d.* and that the ſaid *J. W.* ſhould be amerced; therefore we command you, that you take ſo many cattle of the ſaid *J. W.* in your bailiwick, *in withernam*, and without delay cauſe them to be delivered to the ſaid *J. W.* to be detained by him irreplegiable till he will make a return of the ſaid cattle before taken to the ſaid *J. B.* and in what manner you ſhall execute this our writ, do you make appear to us on the octave of St. *Hilary*, whereſoever we ſhall then be in *England:* we command you alſo, that you take the ſaid *J. W.* if he ſhall be found in your bailiwick, and keep him ſafely, ſo that you have his body before us at the time aforeſaid, whereſoever we ſhall then be in *England*, to ſatisfy the ſaid *J. P.* for the damages aforeſaid; and have you there then this writ. Witneſs, *&c.*

Withernam.

Ca. ſa.

Theſ. Brev. 62.

PRACTICAL DIRECTIONS

As to the making of a DISTRESS, From the Seizure to the Sale and ſuing a REPLEVIN.

THE Landlord himſelf may make the diſtreſs; but it is generally made by ſome other perſon employed by the landlord for that purpoſe; in which caſe, the landlord muſt give to the perſon he employs, a warrant or authority in writing, called a warrant of diſtreſs.

KNOW all men by theſe preſents, that I *W. H.* of the pariſh of —— in the county of —— gent. for divers good cauſes and conſiderations me hereunto moving, have made, nominated, authorized, conſtituted and appointed, and by theſe preſents do make, nominate, authorize, conſtitute and appoint *C. H.* and *S. H.* of the pariſh aforeſaid in the ſaid county, Eſquires, jointly and ſeverally my true and lawful attorney and attornies, for me, and in my name, place and ſtead, either jointly or ſeverally to enter into and upon all that meſſuage or tenement, farm, lands, hereditaments and premiſſes, ſituate and being in the pariſh of —— in the county of —— or

The form of a letter of attorney to impower a perſon to diſtrain.

one of them, and now in the tenure or occupation of *C. O.* yeoman, his under-tenants or aſſigns, and held by him of me at or under the yearly rent of —— pounds, and to make or cauſe to be made, one or more diſtreſs or diſtreſſes on all or any hay, corn, goods, chattels, cattle, beaſts, ſheep, or other effects or things whatſoever, ſtanding, lying, or being in or upon the ſaid demiſed premiſſes, or any part thereof, for all ſuch rent or rents, as was or were due, owing, or in arrear unto me at *Michaelmas* day laſt paſt, for or on account of the ſaid premiſſes or any part thereof; and ſuch diſtreſs or diſtreſſes, when made, or taken for me and on my behalf, to hold, detain and keep, or cauſe to be held, detained and kept, until payment and ſatisfaction be made unto me for all ſuch rent due and in arrear unto me, and all coſts and charges of making ſuch diſtreſs, and in caſe of non-payment thereof within the time limited, after ſuch diſtreſs made, by the laws now in force, to appraiſe, ſell, and diſpoſe of the ſame, or cauſe the ſame to be appraiſed, ſold, and diſpoſed of according to law, I the ſaid *W. H.* hereby giving and granting unto the ſaid *C. H.* and the ſaid *S. H.* my ſaid attornies and attorney, jointly or ſeverally, full power and authority, for me and in my name, on my behalf, to do, or cauſe to be done, all ſuch acts, matters and things whatſoever, touching, concerning, or any ways relating to the ſaid premiſſes, as ſhall or may be neceſſary to or for the purpoſes aforeſaid, as fully and effectually, to all intents and purpoſes whatſoever, as if I myſelf was perſonally

ſonally preſent, and did the ſame, hereby ratifying, confirming and allowing, all and whatſoever my ſaid attorney or attornies, or either of them, ſhall lawfully do, or cauſe to be done in or about the ſaid premiſſes, by virtue of theſe preſents. *In witneſs* whereof I the ſaid *W. H.* have hereunto ſet my hand and ſeal *this 12th day of Auguſt*, in the year of our Lord 1793.

Sealed and *delivered* (being firſt duly ſtamped) in the preſence of us } *M. H.* *H. H.*

It muſt be on a ſix ſhilling ſtamp.

KNOW all men by theſe preſents, that I *W. H.* of, *&c.* —— do hereby authorize and appoint *C. O.* of, *&c.* gent. to take any perſon or perſons to his aſſiſtance, and to enter into the houſe of *A. B.* in, *&c.* and there make a diſtreſs of all ſuch goods and chattels as are in and upon the premiſſes, or any part thereof, for pounds, for one half year's rent due to me the ſaid *W. H.* at *Michaelmas* day laſt. And after the ſaid goods are ſo diſtrained, if the ſaid *A. B.* does not within the time limited by law, pay the rent, or replevy the ſaid goods, then and in ſuch caſe I do hereby authorize you the ſaid *C. O.* to cauſe the ſaid goods to be appraiſed, and according to ſuch appraiſement, to make ſale thereof to ſuch perſon or perſons who will buy the ſame: and to diſpoſe of the money ariſing by the ſale, in ſuch manner as by the ſtatute made for that purpoſe is directed: and for your ſo doing this ſhall be your ſufficient

The form of a warrant to diſtrain.

ſufficient warrant. Witneſs my hand and ſeal this 12th *day of Auguſt* in the year of our Lord 1793.

W. H.

It muſt be on a ſix ſhilling ſtamp.

Sealed and delivered (being firſt duly ſtamped) in the preſence of us, } *W. W.* *S. T.*

To Mr. *D. G.* my bailiff, greeting.

Sir,

A warrant of diſtreſs in this form may be made on a paper without ſtamp.

DIſtrain the goods and chattels of *T. H.* in the houſe he now dwells in, ſituate in —— in the county of —— for —— *l.* being *two years* rent (*or as the caſe may be*) due to me for the ſame at *Michaelmas* laſt. And for your ſo doing, this ſhall be your ſufficient warrant and authority.

Dated, *&c.* 1793. *W. H.*

Form of taking of the diſtreſs.

Being legally authorized to diſtrain, you enter on the premiſſes, and make a ſeizure of the diſtreſs. If the diſtreſs be made in a houſe, you ſeize a chair or other piece of furniture, and ſay, "I ſeize this chair, (*or* "*whatever it be*) in the name of all the goods "in this houſe, for the ſum of —— pounds, "being two years rent (*or as the caſe is*) due "to me (*or to* W. H. *your landlord*) at "*Michaelmas* (*or any other*) day laſt, (*and* "*if the diſtreſs be made by any other than the* "*landlord, you add*) by virtue of an au- "thority from the ſaid *W. H.* for that "purpoſe." You then proceed to take an inventory of ſo many goods as you judge will

will be ſufficient to cover the rent diſtrained for, and alſo the charges of the diſtreſs: Having done this you make a fair copy of the inventory according to the following form; but it need not be made upon a ſtamp, as the 23 *Geo.* 3. *c.* 58. *ſ.* 1. expreſsly excepts an inventory made of goods diſtrained.

No ſtamp required.

An inventory of the goods diſtrained.

"An inventory of the ſeveral goods and "chattels diſtrained by me *D. G.* (the diſ- "trainer) this —— day of —— in the year "of our Lord 1793, in the houſes, out- "houſes and lands (*according to the caſe*) of "*T. H.* (the tenant) ſituate at —— in the "county of —— (*And if the diſtreſs be made "by any other perſon and not by the landlord, "ſay*, by the authority and on the behalf of "*W. H.* your landlord) for the ſum of —— "pounds, being two years rent (or, as the "caſe is) due to me (or, to the ſaid *W. H.*) "at *Michaelmas* (or, any other day) laſt, and "as yet in arrear and unpaid."

1. In the Parlour.	l.	s.	d.
Six leather bottom chairs, mahogany frames			
A ſet of mahogany dining tables	-		
A large pier looking glaſs	-		
A Pembroke table	-	-	

2. In the Kitchen.			
A wainſcot table	-	-	
Five large kettles	-	-	
Three copper ſaucepans		-	

3. In the Dining Room.			
Six chairs, &c.	-	-	

Who may take the inventory.

The inventory may be taken by the perſon who diſtrains the goods; nor is an appraiſer neceſſary till after the end of the five days allowed the tenant to pay the rent, or replevy the goods by 2 *W. & M. ſ.* 1. *c.* 5.

Manner of proceeding.

After the inventory is taken, you muſt write at the bottom a notice to the tenant, to acquaint him of ſuch diſtreſs being made, and the time when the reht and charges of the diſtreſs muſt be paid, or the goods replevied.

If the goods are ſecured in the houſe, the following notice muſt be given *verbatim*, if not, ſo much as relates to the ſecuring the goods muſt be omitted; if ſecured off the premiſſes, the tenant in his notice muſt be informed of the place where.

Notice to the perſon whoſe goods are diſtrained to be written at the bottom of the inventory.

Mr. *T. H.*

TAKE notice, that I have this day ſeized and diſtrained the goods and chattels in the above inventory particularly mentioned (*by virtue of an authority for that purpoſe from Mr. W. H. your landlord*) for one half year's rent due and in arrear to me (or to the ſaid *W. H.* as the caſe may be) on Lady-day laſt, for a houſe, *&c.* in ——, *and have ſecured the ſaid goods and chattels in the parlour, kitchen and dining-room in the ſaid houſe*, and that unleſs the ſaid arrears of rent and charges of diſtreſs are paid, or the goods and chattels replevied within five days from the date hereof, the ſaid goods will be appraiſed, and ſold according to law.

Dated *&c.* 1793. *S. H.*

It is not neceſſary to mention when the rent became due for which the diſtreſs is made. Need not mention the time of the rent being due.

Thus in the caſe of *Moſs* and *Gallimore*, *Doug.* 279. an objection was taken to a notice which expreſſed the rent to be due at *Michaelmas*, whereas the rent was only due, and payable in *May*, but Mr. *J. Buller* ſaid, that it was not neceſſary by the ſtatute of *William* and *Mary*, to ſet forth in the notice at what time the rent became due, and no farther notice was taken of the objection.

A true copy of the inventory and notice was this —— day of ——— 1793, delivered to the abovementioned *T. H.* in the preſence of us, Memorandum of delivering a *true copy* of the inventory to the tenant.

W. S.
R. K.

A true copy of the above inventory and notice muſt either be given to the tenant himſelf or to the owner of the goods, *Buller's Ni. Pri.* 81. or left at the tenant's houſe; or if there be no houſe, on the moſt notorious place on the premiſſes. And it is proper to have a perſon with you when you make the diſtreſs, and alſo when you ſerve the inventory and notice, to examine the inventory, and to atteſt, if there be occaſion, the regularity of the proceedings. How the inventory and notice muſt be ſerved.

The ſafeſt way is to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to; but it The time and manner in which the goods are to be removed and ſold.

it is now moſt uſual to let them ſtay on the premiſſes, and leave a man in poſſeſſion to protect them till the expiration of the five days allowed by ſtatute before they can be ſold, which by a late determination were held to be incluſive of the day of ſale.

The five days allowed before the goods may be ſold are incluſive of the day of ſale, Wallace v. King 1 H. Bl. 13. Ante 78.

As where a diſtreſs was made and an inventory taken, with a regular notice of ſale given on *Saturday* the 12th of *May* 1787, and in the afternoon of the *Thurſday* following, *viz.* 17th *May* they removed the goods and ſold them, and on an objection taken that they were ſold a day too ſoon, the Court of Common Pleas held that on the *Thurſday* afternoon, five days from the time of the diſtreſs had completely expired, and that the ſale was regular according to the time allowed by the ſtatute.

Fees to the man in poſſeſſion.

Note: The man in poſſeſſion of the goods, *&c.* is to be paid two ſhillings and ſixpence *per* day, if the tenant keeps him; and three ſhillings and ſixpence if he keeps himſelf.

How to act if the ſheriff is in poſſeſſion on an execution.

If the ſheriff is in poſſeſſion of the goods of a tenant on *an execution*, the landlord need not make a diſtreſs, but ſhould forthwith ſerve him with the following notice:

To *E. S.* Eſq. Sheriff of the County of ——.

Notice to the ſheriff.

TAKE notice that there is now due from *T. H.* the perſon to whom the goods belong you are now in poſſeſſion of, by

by virtue of his Majeſty's writ of *fieri facias*, *&c.* returnable (here mention the return) the ſum of —— pounds for one year's rent due at *Michaelmas* day laſt. As witneſs my hand this —— day of —— 1793.

W. H. Landlord of the Premiſſes.

If the tenant requires time, the landlord muſt take his written authority to continue in poſſeſſion.

But if there is no ſheriff in poſſeſſion on an execution, and the tenant wants further time for to raiſe the money, and the landlord chooſes to give him ſuch indulgence, he muſt take a memorandum in writing from the tenant, that poſſeſſion is continued at his requeſt, and by his deſire, or the landlord will be deemed a treſpaſſer for continuing in poſſeſſion beyond the time which is limited by ſtatute for the ſale of the diſtreſs, and liable to an action for ſo doing.

Notice where the tenant requires further time for the payment of rent, &c.

Memorandum, } THAT I *T. H.* do hereby conſent and agree that *W. H.* my landlord, who has this day (or, who on the —— day of —— laſt) diſtrained my goods and chattels for rent, in a meſſuage or dwelling-houſe (according to the caſe) ſituate at —— in the county of —— ſhall continue in poſſeſſion of my ſaid goods and chattels in the ſaid meſſuage or dwelling-houſe for the ſpace of —— from the date hereof, the ſaid *W. H.* having agreed to forbear the ſale of the ſaid goods and chattels for the ſaid ſpace of time, to enable me to diſcharge the ſaid rent. And I the ſaid *T. H.* do hereby agree to pay the expences of keeping the ſaid poſſeſſion. As *witneſs* my

my hand this —— day of —— in the year of our Lord 1793.

T. H.

Ante 78.

But if there be no allowance of further time, at the expiration of *the fifth day from the time of the diſtreſs and notice*, the ſheriff's office ſhould be ſearched to ſee if the goods have been replevied; if they have not, go to the premiſſes; where, if the rent and charges of the diſtreſs are not paid, you ſhould ſend for a (*a*) conſtable of the hundred, pariſh or place where the goods were diſtrained, and two ſworn appraiſers (*b*), who having viewed the goods muſt be ſworn by the conſtable (*the ſheriff, under-ſheriff or conſtable are impowered to ſwear them*, Bull. Ni. Pri. 81.) in the uſual way.

The manner of appraiſing and ſelling the goods if not replevied before the expiration of *the fifth day from the day of the diſtreſs and notice.*

(*a*) If the diſtreſs is taken in two hundreds, *the conſtable of the place where the diſtreſs is driven or put*, is the proper officer within the 2 W. & M. ſeſ. 1. c. 5. Bull. Ni. Pri. 81.

(*b*) In the caſe of *Wallace againſt King and others*, 1 *H. Bl.* 13. an objection was taken to the ſale of a diſtreſs taken in the pariſh of A. becauſe the appraiſement was made by appraiſers who were ſworn before the conſtable of the pariſh of B. each pariſh being in the *ſame* hundred but in *different* diviſions, and each having *different conſtables*; upon the ground that *a conſtable* could only act within the pariſh or diſtrict of which he was appointed conſtable; but the caſe turning upon a different point, the Court of Common Pleas did not decide whether the conſtable had exceeded his authority or not.

But vide 1 H. Bl. 15. n. where it appears that in the caſe of *Blatcher* v. *Kemp*, *Maidſtone* Summer Aſſizes 1782, *Ld. Mansfield* decided "that no conſtable could act under a warrant *out of his diſtrict*, and that the general direction in the warrant was to be taken to *each within his diſtrict*."

The appraiſers' oath.

"YOU and each of you ſhall well and truly appraiſe the goods and chattels mentioned in this inventory (*the conſtable or perſon who adminiſters the oath at the ſame time holding the inventory in his hand, and ſhewing it to the appraiſers*) according to the beſt of your judgment. So help you God."

Memorandum of the appraiſers being ſworn.

Memorandum, THAT on the —— day of —— in the year of our Lord 1793, *J. H.* of, *&c.* and *W. S.* of *&c.* two ſworn appraiſers, were ſworn upon the *Holy Evangeliſts* by me *D. G.* of, *&c.* conſtable (or ſheriff or under-ſheriff) well and truly to appraiſe the goods and chattels mentioned in this inventory, according to the beſt of their judgment. As witneſs my hand,

D. G. Conſtable.

Preſent at the time of ſwearing the ſaid *J. H.* and *W. S.* as above, and witneſſes thereto,
S. O. H.
C. H. H.

After the appraiſers are ſworn and have valued the goods, you go on with the indorſement on the inventory as follows:

Memorandum to be indorſed on the inventory.

WE the abovementioned *J. H.* and *W. S.* being ſworn upon the *Holy Evangeliſts* by *D. G.* the conſtable abovementioned (or ſheriff, *&c.* as the caſe may

be) well and truly to appraiſe the goods and chattels mentioned in this inventory, according to the beſt of our judgment, and having viewed the ſaid goods and chattels, do appraiſe and value the ſame at the ſum of —— pounds. As witneſs our hands, the —— day of —— in the year of our Lord 1793.

J. H.
W. S. } Sworn Appraiſers.

Who may be ſuch appraiſer.

If the perſon diſtraining is ſworn as one of the appraiſers, it is illegal, for he is intereſted in the buſineſs, and the (*a*) ſtatute ſays that *he* with the ſheriff, under-ſheriff, or with the conſtable of the hundred, pariſh or place where ſuch diſtreſs ſhall be taken, ſhall or may cauſe the goods to be appraiſed by two ſworn appraiſers.

(*a*) 2 W. & M. ſeſſ. 1. c. 5. Bull. Ni. Pri. 81.

Manner of diſpoſing of the goods.

When the goods are thus valued, it is uſual for the appraiſers to buy them at their own valuation; and a receipt at the bottom of the inventory, witneſſed by the perſon who ſwore them, is uſually held a ſufficient diſcharge.

But if the diſtreſs be of conſiderable value, it is much more adviſeable to have a proper bargain and ſale between the landlord, the perſon who ſwears them, the appraiſers, and the purchaſer, for the better proving the tranſaction afterwards, if there ſhould be occaſion.

After the goods are diſpoſed of.

The goods taken in diſtreſs being diſpoſed of, you ſhould deduct from the amount of their produce the rent in arrear, and all reaſonable

ſonable charges attending the diſtreſs, after which, the overplus (if any) is to be returned to the tenant.

If the tenant means to replevy the diſtreſs, he muſt within the time allowed him by the ſtatute for that purpoſe, that is, within five days after he has notice of the diſtreſs, take with him two houſekeepers, living in the city or county where the diſtreſs was made, and go to the ſheriff's office of ſuch city or county; where he muſt enter into a bond, with the two houſekeepers, as ſureties, in double the value of the goods diſtrained (ſuch value to be aſcertained by the oath of one or more witneſſes not intereſted, which oath the perſon granting ſuch replevin is to adminiſter) conditioned for the proſecution of a ſuit in replevin, againſt the diſtrainer with effect; and for returning the goods, if a return thereof ſhall be awarded, upon this the ſheriff will direct a precept to one of his bailiffs; and by that means, the poſſeſſion of the goods will be reſtored to the tenant, to abide the event of the ſuit in replevin.

If the tenant means to replevy the diſtreſs.

11 Geo. 2. c. 19.

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